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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1636

ROSALIE REED,
Petitioner,

vs.

THE CITY OF LOS ANGELES, RECREATION AND PARKS DEPARTMENT OF SAID CITY, AND THE CIVIL SERVICE COMMISSION OF THE CITY OF LOS ANGELES,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the
State of California

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PETITION FOR WRIT OF CERTIORARI
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OPINIONS OF COURTS BELOW

Petitioner, Dr. Rosalie Reed, appeals and asks that a Writ of Certiorari issue to review the following decisions of the Courts of the State of California:

a) A postcard decision of the California Supreme Court stating "Hearing Denied", this following a Petition seeking a review of an intermediate California Court of Appeal, attached as Appendix A.

b) The opinion of the California Court of Appeal, Second Appellate District, Division Three (ordered "Not To Be Published"), attached as Appendix B.

c) The judgment of the Los Angeles Court Superior Court, attached as Appendix C.

d) The decision of the City of Los Angeles, California, Civil Service Commission, discharging Petitioner from her tenured position as a doctor of veterinarian medicine at the Los Angeles Zoo. No written opinion of that Commission was issued, their decision simply being orally announced at a Commission hearing. See Appendices D and E.

JURISDICTION STATEMENT

I. The decisions referred to above were issued on the following dates:

1) Los Angeles Civil Service Commission decision—February 27, 1976.

2) Los Angeles County Superior Court judgment—entered May 18, 1976.

3) California Court of Appeal, Second Appellate District, Division Three—December 29, 1977.

4) California Supreme Court Order denying Petition for Hearing—February 22, 1978.

II. The statutory provisions believed to confer on this Court jurisdiction to review the judgments referred to are:

1) 28 U.S.C. 1257(2) (3) and,

2) United States Supreme Court Rule 19(a).

QUESTIONS PRESENTED FOR REVIEW

(I) On April 16, 1974, this United States Supreme Court issued its decision in *Arnett v. Kennedy,* 416 U.S. 134, upholding the constitutional right of a government employee to at least a minimal predischarge hearing. Five months later, on September 6, 1974, Petitioner was fired from her position as a doctor of veterinarian medicine at the Los Angeles Zoo, without any predischarge hearing whatsoever. In addition, both at the time she was hired and at the time she was fired there existed a rule in the department of her employment, *mandating* a predischarge hearing. This rule was also totally ignored. Petitioner appealed to the Civil Service Commission, and before the hearing was completed on the medits of the charges, through new counsel a motion was made seeking Petitioner's reinstatement pending the granting of her constitutional and contractual right to the predischarge hearing. The motion was ultimately denied.

The question presented for the first time flows from *Arnett* and asks: Does government have the alternative of granting a constitutional minimum predischarge hearing, or in the alternative denying such a hearing, then taking 1½ years to complete a formal hearing, and requiring the employee to go to court to get back pay?

(II) As the facts set forth in this Petition reveal, Petitioner was denied the right to complete the hearing on the merits of the charges. Witnesses she had subpoenaed under the administrative rules and regu-

lations, were not recalled by the Commission for a hearing on January 19, 1976, in accordance with the hearing officer's order following the making of the aforementioned reinstatement motion. Additionally, Petitioner's prior counsel, who was the only attorney present during prior hearings on the merits, unilaterally withdrew from the case, but the hearing officer refused a continuance and demanded that the case proceed on the merits. Additionally, the City Attorney of Los Angeles acted as legal adviser to the Civil Service Commission (the judge) and as prosecutor of the charges against Petitioner.

The question presented: Is a government employee denied due process when not permitted to complete the presentation of evidence to refute false charges, the inability to present the evidence existing because the government agency charged with the responsibility of having those witnesses present failed in its responsibility and the hearing officer refused a continuance? Further, is a government employee denied due process when a lay administrative judicial body (Civil Service Commission) has as its legal adviser the same attorney who is prosecuting the case against an employee?

(III) After receipt of the hearing officer's recommendation upholding the discharge, the Civil Service Commission unanimously adopted a resolution calling for only a 60-day suspension of Petitioner in lieu of discharge. Under the Charter of the City of Los Angeles, authorized by the California Constitution, the Civil Service Commission (the body charged with

the responsibility of hearing appeals from employees who have been penalized or discharged) may not alter a penalty *without permission of the person imposing that penalty.*

The question presented: Is it a denial of due process and equal protection of the law to deny to an administrative judicial body the right to make its own decisions with regard to penalties to be imposed? Contrawise is there due process and equal protection afforded a penalized employee when the person in the executive branch of government who imposed the penalty, may prevent the administrative judicial body from exercising its own discretion?

(IV) The record in this case discloses, as far as can be ascertained, that Dr. Rosalie Reed is the only Black woman serving as a veterinarian in any major zoo in the United States. The facts regarding racism and sexism in this case are more particularly set forth below and will not be repeated.

The question presented: Has Petitioner been discriminated against because of her skin color and her sex?

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

(1) The pertinent portion of the United States Constitution, Fifth Amendment, which reads:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . . ."

(2) The pertinent portion of the Fourteenth Amendment, United States Constitution, which reads as follows:

> "No state shall make or force any law which shall abridge the privilege or immunities of citizens of the United States; nor shall a state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(3) The pertinent portion of the California Constitution, Article I, Section 13, which reads as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

(4) The Los Angeles City Charter, Article IX, Section 112, the pertinent portions thereof being as follows:

> (After establishing the power of the appointing authority to remove, discharge, or suspend employees by written notice served upon the employee the following pertinent language occurs:)
>
> "*Within 15 days* after such statement shall have been filed, the said Board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said Board within 5 days of service upon him of such statement, *shall proceed to investigate the grounds for such removal, discharge or suspension.*" (Emphasis added.)
>
> "The Board *with the consent of the appointing authority* may also order a reduction in the

> length of the suspension, or substitution of the suspension for a removal or discharge. . . ." (Emphasis added.)

(5) City of Los Angeles, Parks and Recreation Department "Standards of Behavior—Procedure Statement" which reads in its entirety as follows:

> "IV-05-01
>
> June 1, 1965 (R 2/3/75)
>
> Page 1
>
> STANDARDS OF BEHAVIOR
>
> *Procedure Statement*
>
> I. This is a detailed description of the procedure for determining a violation of, and notifying employees that they have not met, reasonable standards of behavior as required by the Board of Recreation and Park Commissioners.
>
> II. The Supervisor, upon notification of misconduct of any employee, will gather all facts and submit a written report and recommendation to the Division Head. The Division Head will study such report and secure other information he may need to render a decision, if the misconduct is within his discretion and authority. Disposition by the Division Head (for less serious behavioral violations) will normally be restricted to a verbal reprimand or a written Notice to Correct Deficiency. Copies will be forwarded to the Branch Superintendent, to the Personnel Division and to the employee.

III. Where the misconduct is of a more serious nature, not within the discretion and authority of the Division Head, a conference will be held to review the facts and to recommend proper disciplinary action. Such conference will involve the employee, the immediate supervisor, the Division Head, and a representative of the Personnel Office. The employee may, if he so wishes, request the assistance of a representative. Written reports will be prepared by the Personnel Division, with a copy to the employee. The Branch Superintendent will initial his approval of such reports.

IV. If the written findings in paragraph III, above, result in a recommendation for suspension or discharge, the Executive Officer will review such recommendation and, if approved, will direct that official papers be prepared for signature of the General Manager. Such actions will be supported by such documentation as would satisfy review by the Civil Service Commission.

V. Where Department employees are arrested and booked on serious charges involving criminal, immoral or scandalous conduct, the general intent of the Board is that such employees be suspended pending final disposition by the courts and investigation by the Department. However, the General Manager may waive this paragraph of the Policy if he believes the suspension of the employee would not be in the best interest of the City and Department or would create an unjust and inequitable treatment of the employee."

STATEMENT OF FACTS

Petitioner is a young Black woman who clawed her way out of the ghetto, became a professional Doctor of Veterinarian Medicine, licensed in the States of New York and California, and finally realized her lifelong goal of holding a position at a major zoo treating exotic animals. She was hired by the Los Angeles Zoo, Parks and Recreation Department, in 1972, and received excellent performance reports until she was summarily discharged on September 6, 1974, by a new zoo director (hired without examination) who had not even completed his six month probationary period when he discharged Dr. Reed on alleged facts occurring *prior* to his being hired. She was given no notice in advance of the discharge, finding the "effective immediately" notice under her door when she returned home from work one evening. She immediately wrote out her own notice of appeal from the discharge and filed the same with the City of Los Angeles.

At the time Petitioner was hired, when she was discharged, and yet today there is in the department in which she was employed the previously set forth rule mandating a predischarge hearing before specified individuals, and requiring a written report of that hearing *prior* to any disciplinary action or discharge of an employee. Dr. Reed was never afforded this hearing.

Additionally, this United States Supreme Court had decided the case of *Arnett v. Kennedy,* 416 U.S. 134, on April 16, 1974, five months prior to Peti-

tioner's discharge, that case establishing an employee's right to at least a minimal predischarge hearing prior to any discharge.

Dr. Reed retained an attorney to represent her in the administrative proceedings, and this attorney completely failed to discover the aforementioned departmental rule or this Court's decision in *Arnett*. He simply proceeded to take her into a hearing on the merits of the charges. The charges, incidentally, were so vague in the Notice of Discharge that the City Attorney had to amend them twice before the case proceeded to hearing.

As seen above, Section 112 of the Los Angeles City Charter requires the Commission to ". . . investigate the grounds for such removal, discharge or suspension" within 15 days of an appeal by an employee. Dr. Reed's administrative case required 1½ years to complete! Her appeal was filed on September 6, 1974, and yet the Los Angeles Civil Service Commission didn't act until September 24, 1974, and then only set the matter for hearing on November 13, 1974, before a hearing officer. Dr. Reed's then counsel requested a short continuance, and this was granted to December 11, 1974. Thereafter at the request of the City the matter was continued 5 months to May 28, 1975, the first day when any evidence was received on the merits of the charges. Further testimony on the merits was taken on May 29, 1975, and July 1, 1975. August 25, 1975, was established as a date for yet further testimony.

On this latter date, Petitioner's present counsel appeared specially with her for the first time, presented evidence through testimony of the zoo director, Warren Thomas, that no predischarge hearing had been held, and moved that the hearing be discontinued and Dr. Reed returned to her position until given her constitutional right established by this Court's decision in *Arnett,* and her contractual rights established by the aforementioned departmental rule mandating the predischarge hearing. It is not disputed by the City of Los Angeles that there was no predischarge hearing.

Under the administrative rules Dr. Reed had several witnesses present on August 25, 1975, who had been subpoenaed at her request by the Civil Service Commission. After discussion, and because of the motion, the hearing officer released these witnesses on condition that they would return at a future date on *orders of the Commission,* the body responsible to subpoena witnesses for such hearings. He further ordered the motion briefed by both sides, stating he would then rule on the motion and thereafter permit time for his decision to be taken to "higher authorities" and finally resolved, with no further testimony to be taken on the charges unless the motion was ultimately decided against Dr. Reed. The hearing officer's role in Los Angeles is much as it is in many quasi judicial administrative proceedings. He hears cases and then makes a recommendation to the Commission which has the ultimate responsibility for making the decision.

Following the aforesaid motion of August 25, 1975, the Supreme Court of California on October 2, 1975, issued its decision in *Skelly v. State Personnel Board*, 15 C.3d 194, a decision following *Arnett* and mandating in California the right to a predischarge hearing. Since the hearing officer's responsibility is only to make recommendations, Dr. Reed and her counsel immediately appeared before the Civil Service Commission asking the Commission to follow *Skelly* and return Dr. Reed to her position pending the granting of her constitutional and contractual rights. The Los Angeles City Attorney, who acted both as legal counsel to the Civil Service Commission and also as the prosecutor of charges against Dr. Reed, advised the Commission it could not make such a decision and that the matter had to be returned to the hearing officer. The Commission followed the advice of the City Attorney, returning the matter to the hearing officer.

An appeal to the Superior Court of the State of California asking for an injunction so as to return Dr. Reed to her position, or at least have back pay and return to the payroll, was unsuccessful, the Court simply ordering the City to complete its determinations rapidly. Shortly before the hearing before the Court (December 30, 1975) the Commission had sent a notice that the matter was to be back before the hearing officer on January 19, 1976.

Dr. Reed and her present counsel again appeared at this hearing anticipating a ruling on the motion previously mentioned. Instead, the hearing officer re-

fused *and ordered the case to proceed on the merits of the charges.* Dr. Reed's present counsel pointed out: (1) it was impossible to proceed on the merits since he had no transcript of the prior hearings (and her first attorney had unilaterally withdrawn from the case), (2) his client was totally indigent and could not afford to purchase the transcript (and according to the Civil Service Commission reporter, it could not have been available by that hearing date even if it had been ordered when that hearing date was first established), (3) that this was in violation of his (the hearing officer's) own prior order that he would make a decision on the motion prior to any further hearing on the merits, and (4) most importantly, the witnesses previously subpoenaed by Dr. Reed to support her position *had not been ordered to return by the Commission and were not present.* The hearing officer stated he would not listen to a motion for continuance, and ordered the hearing to proceed.

Dr. Reed's counsel further objected to the City Attorney proceeding with the matter on the grounds that his office was acting both as adviser to the judge (the Civil Service Commission) and as prosecutor against Dr. Reed on the charges. The objection was denied.

Thereafter, on the 2nd day of February, 1976, the hearing officer issued his decision holding Dr. Reed guilty of all charges save one, denied the constitutional and contractual motion, and recommended that the discharge be upheld. This upholding of all

charges against Dr. Reed, save and except one minor one, was done in spite of the fact that on August 25, 1975, the hearing officer stated he found possible merit as to only *one* of the charges (loaning supplies to another veterinarian) and following that statement *no further testimony of any kind was taken on the merits.* On the one charge of loaning supplies to another veterinarian, the record discloses that the zoo director who had fired Dr. Reed, as well as Dr. Reed, testified that such loaning of supplies between veterinarians is very common. The record further establishes that when these supplies were loaned by Dr. Reed, it was an emergency, she made a complete list, gave it to the secretary of the zoo, and indicated that there was to be a follow-up to make sure the supplies were all returned.

Thereafter, at a hearing to act on the hearing officer's recommendation, the Civil Service Commission *unanimously* adopted a motion recommending only a 60 day suspension in lieu of discharge. (A prior motion for a 90 day suspension failed for a lack of a second.) The Commission was then informed by the City Attorney that under the Los Angeles City Charter the Commission could not amend the discharge to a suspension without permission of the person who had discharged Dr. Reed in the first place! The section of the Charter involved reads as follows:

> "The Board *with the consent of the appointing authority* may also order a reduction in the length of suspension, or substitution of a suspension for a removal or discharge, if the Board finds, in writing, that such action is warranted." (Los Angeles City Charter, Section 112.) (Emphasis added.)

The Commission then sent its proposal for a 60 day suspension to the Parks and Recreation Department, and on February 27, 1976, the Commission again met to be told the suspension was not acceptable to that department, it wanted the discharge. The City Attorney advised the Commission it had but two choices, namely, to totally reinstate Dr. Reed or to uphold the discharge. Based on this advice the Commission then voted to sustain the discharge. This was done with no transcript of the alleged evidence, the Commission having only the hearing officer's summary from the hearing that was *never completed.*

Following the Commission's decision and the end of the administrative process, Dr. Reed sought a writ of mandate from the Los Angeles Superior Court asking for reinstatement and back pay until she was afforded her contractual and constitutional rights to a predischarge hearing and to at least a complete hearing on the merits. The court denied the motion but ordered that she be given back pay to January 19, 1976. It is noted here that the pay was not even ordered to February 27, 1976, the date when the Commission finally acted on the matter by upholding the discharge.

An appeal to the California Court of Appeal resulted in a sustaining of the Superior Court, but issues such as 1) the constitutionality of the Charter denying the Commission's right to make its own deci-

sions' concerning discipline to be imposed, 2) the City Attorney serving in the capacity as attorney for the judge and as prosecutor, 3) the fact that the witnesses Dr. Reed had subpoenaed were not recalled as required by the Civil Service Commission rules and the hearing officer's order, and 4) the fact that the hearing was not completed, were either not discussed or only briefly referred to.

Additionally, when the matter was before the Superior Court (Trial Court) the discharge was challenged on the basis of insufficient evidence to support the charges. A motion was made that the court order production of the transcript of the hearings on the merits where evidence had been taken, the motion being based on the fact that Dr. Reed was totally indigent (having to live off funds borrowed from friends) and thus was unable to present that record to the court. The motion was denied, even though the court had the power to order the transcript under California Code of Civil Procedure, Section 1094.5(a), which reads:

> ". . . All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer, may be filed with the Petition, may be filed with Respondent's Points and Authorities, *or may be ordered to be filed by the court.*" (Emphasis added.) (California Code of Civil Procedure, Section 1094.5(a).)

A petition for hearing was filed with the California Supreme Court, and that court issued its postcard with the two words "Hearing Denied".

This case is fraught with one other issue—racism and sexism. It stands undisputed in the record that on their being introduced, the first words the zoo director said to Dr. Reed were, "Why are you so damn tall?". Further, Dr. Reed had been phoned prior to the director's arrival and told he was a racist and would cause her trouble.

It also stands undisputed in the record that the hearing officer shouted at Dr. Reed at the final hearing on January 19, 1976, the date when he demanded that she proceed on the merits. As we have seen, he held against her on all but one minor charge although he previously had said only one charge had any merit, and following that statement no further evidence on the merits was received. Additionally he failed to follow his own order of issuing his decision on the constitutional and contractual motion and allowing that to be tested prior to proceeding on the merits. His actions evidenced such bias against Dr. Reed that her present counsel wrote the Civil Service Commission protesting the decision *before knowing the decision.*

Even with all of this, Dr. Reed did not rush out to the media, civil rights groups, and women's organizations, so as to carry on a huge publicity campaign concerning her case. Instead, she acted in a most professional manner; she followed the judicial process to seek redress—redress which has been denied at every step. Now her last opportunity for fair treatment under the law rests with this Court.

At this time Dr. Rosalie Reed is filled with pain, and, tragically, the greatest of fear—that her determination to serve life via her chosen profession as a veterinarian in a major zoo, will be totally and completely destroyed. The record establishes she is the only Black woman veterinarian in any zoo in the United States. Further through her appearances on television, before classes at schools, and through articles about her in national magazines she had brought very positive publicity to the Los Angeles Zoo. The record further establishes she has always denied that any of the charges brought against her are true. Most amazingly the record discloses that Dr. Reed has said if she is reinstated, she will go back to work, do her job, and do everything in her power to see that there is no difficulty in working with the zoo director.

Certain matters will now be mentioned, some of which are not technically in the record. These are being put in by counsel, and it is trusted that no holding against Dr. Reed would be made on the fact that counsel presents these points.

Warren Thomas, the zoo director who fired Dr. Reed, was a man whom Dr. Reed had been advised was a racist and would cause her trouble. Counsel has been advised, and offers to prove to this Court that when this man was the director at the Omaha Zoo, he sought to get rid of all Blacks employed there. Further, counsel offers to prove that this man was thereafter hired at a private zoo in Texas on a three year contract, but after approximately one year the owner

of that private zoo bought up the contract to get rid of him. The fact that he mistreated animals is set forth in a book bearing Library of Congress #0-690-0196-6, where the following statement is made:

"'LIVING TROPHIES'
by
Peter Batten
1976

Thomas Y. Crowell Company
New York

Library of Congress # 0-690-0196-6
Preface viii & ix

'In 1973 the city council decided to close down the zoo and unanimously voted to return the animals to me. This transfer was consummated on September 5, 1973. A futile effort by a reorganized zoo society to build a new zoo in neighboring Santa Clara fizzled out, and I began efforts to place the animals.

Among the many U.S. zoos contacted, only one appeared appropriate for the continued care of my animals. At the Gladys Porter Zoo in Brownsville, Texas, Director Warren Thomas, DVM, was most sympathetic and interested in acquiring several of the rarer species. He assured me that they would be kept together and would find a "splendid home" there. In the middle of December 1973 twenty-four mammals and birds left California for a new home. Unfortunately, I was at that time unaware of Dr. Thomas's unusual record and ethics.

In subsequent telephone conversations, Thomas assured me that the animals were doing well. Six

weeks later I decided to see their new home and drove to Brownsville with a former zookeeper, Deborah Stancil, who later became my research assistant. We found that in their "splendid home", five out of the original twenty four were dead, six injured or mutilated by poor husbandry, and two traded to other zoos for species considered by Thomas to be of more use to his zoo.

This unpleasant discovery involved six days of evasive action and prevarication by the director, and prompted a personal investigation of other American zoos with the subsequent decision to produce this book. The title was chosen as appropriate to the attitude many zoo directors show toward their animals.'

* * *

Page 223

Texas, Brownsville

'Anteaters on concrete; feet mutilated from rough surface (photo: p. 43); water moats hazardous; dirty.

Seal pool was fresh water, dirty. Seals suffering photophobia. Lions indoor housing has many internal extrusions, damaging one animal's head.' "

Finally, we believe this Court can take additional note of the fact that this man is not a licensed veterinarian in California, and yet he has practiced medicine on animals at the Los Angeles Zoo. He had to be advised by the State of California Board of Examiners in Veterinary Medicine that he must not do this.

Finally, we point to one more fact—a fact that is in the record. Two employees at the Los Angeles Zoo

were caught attempting to steal valuable birds. They admitted this fact, *and were given five days' suspension and nothing more.* Dr. Reed, on far less serious charges, was discharged! !

MANNER AND STAGE AT WHICH FEDERAL QUESTIONS WERE RAISED

As can be seen from the foregoing facts, the constitutional issue of Petitioner's due process right to a minimal predischarge hearing was first raised before the Civil Service Commission Hearing Officer *prior* to the hearing on the merits being concluded. After taking evidence establishing that no predischarge hearing had been held, and discussion of the constitutional issues, the following motion was made to the hearing officer:

> "I would move that this hearing be terminated and that Dr. Reed be reinstated until such time as due process has been followed." (Record of CSC Hearing Officer, August 25, 1975; page 224, lines 7-9, record on Appeal.)

The due process issues of: (1) not allowing Petitioner to complete the hearing and present her witnesses (the Commission having failed to recall the witnesses in accordance with the hearing officer's prior order), (2) the Petitioner's lack of counsel (when ordered to proceed with the hearing even though the witnesses were not present), and (3) the City Attorney acting as both legal adviser to the Commission (which was to make the decision) and as

prosecutor of the charges against Petitioner, were first raised before the hearing officer. The following appears in the record regarding these issues:

> "Mr. Thorne (Petitioner's counsel): . . . First off, I am here, but the record should reflect the fact that I appeared at the August 25, 1975, hearing specially and not as general counsel for Dr. Reed. I appeared for the sole purpose of making a motion that was then made, namely, that the case be dismissed by the Civil Service Commission with an order that Dr. Reed be reinstated and given full back pay in view of the fact that her constitutional right of due process was violated in that she was summarily fired without any hearing whatsoever in advance of that firing and, in particular, that she had been fired without any hearing in accordance with the existing rule of the Parks and Recreation Department . . .
>
> . . . .
>
> I have not been involved in prior hearings, I know none of the witnesses who have testified, nor whatever evidence has been received. I have not done any investigating on the case, I have not been involved in the merits of the case. I do not have a transcript of the prior hearings—and, I am really not in a position as an attorney to adequately represent Dr. Reed." (Record of CSC Hearing Officer, January 19, 1976; found at page 261 Court record on appeal.)

Mr. Thorne: My appearance has been special, my appearance in this case, and a review of the declaration that is attached to that November 20th letter to the Civil Service Commission, namely, the Declaration of Dr. Reed, indicates

clearly that from a financial standpoint, from a physical standpoint, from any standpoint that would approach Dr. Reed, it was totally impossible for her to obtain funds to purchase the transcript. Thus, as an attorney, I could not come in and represent her not knowing the testimony that has proceeded, not having seen the witnesses and talked with them, not knowing anything about what occurred in the prior hearing; I couldn't go ahead and represent her. It would be somewhat like representing myself, I then would have an idiot for a lawyer and a fool for a client, and I don't intend to do that." (Record of CSC Hearing Officer, January 19, 1976; found at page 285 Court record on appeal.)

"Mr. Gottlieb (Hearing Officer): . . . I will not hear a motion for continuance on the basis of lack of counsel." (Record of CSC Hearing Officer, January 19, 1976; found at page 282 Court record on appeal.)

"Mr. Gottlieb: All right. I am requiring that the Appellant proceed.

Mr. Thorne: On the merits?

Mr. Gottlieb: On the merits. . . ." (Record of CSC Hearing Officer, January 19, 1976, page 299, Court record on appeal.)

. . . .

"Mr. Thorne: Mr. Hearing Officer, I can straighten that out. Dr. Reed, prior to the August hearing thought she was proceeding on the merit and she therefore, through Mr. Coontz, or she directly contacted Miss Gonzales in accordance with the rules and asked that certain individuals be subpoenaed. They were in fact subpoenaed, and they did in fact show up at the August 25 hearing. We had some discussion following the

motion that we made at that time and it was agreed there would be no proceeding on the merits; that we would await your ruling; that you were going to make the decision, but you wanted the briefs first because if you ruled favorably on the motion, then there would be no reason for any further hearing on the merits. So, the witnesses were instructed that they were still under subpoena, but they were going to be released at that time without testfying on the condition that they would return when notified by the Commission of further hearing on the merits and so everyone had left and it was not Dr. Reed's duty to have them notified; it was in fact the duty of the Civil Service Commission because their rules call for it.

Mr. Gottlieb: Well, let's say it would have been my duty to ascertain whether they were notified, and if this was in fact the matter in which instructions were given, then perhaps I have been negligent in not contacting them." (Record of CSC Hearing Officer, January 19, 1976; found at pages 304-305 Court record on appeal.)

. . . .

"Mr. Thorne: I would just like to make a further motion, that the City Attorney be disqualified from participating in this hearing, in that the City Attorney sits representing the Parks and Recreation Department in prosecuting charges before the Civil Service Commission and, additionally, sits as attorney for the Civil Service Commission advising the Civil Service Commission as to its duties and responsibilities, thus he is appearing as attorney for the prosecution and appearing as the attorney for the judge which is,

namely, the Civil Service Commission, and I think that is just a little bit—unfair to anyone that is brought up with any kind of charges." (Record of CSC Hearing Officer, January 19, 1976; found at pages 274 Court record on appeal.)

The due process and equal protection questions relating to the Los Angeles City Charter (prohibiting the Civil Service Commission from making an independent decision with regard to penalty) first came up before the Civil Service Commission. We find the following in the record:

"President Hartsfield (Chairman of CSC): Well, let me—I anticipate your concern. Whether you agree with our Charter or not, we do not have the authority to substitute a suspension in lieu of discharge. Our Charter requires us to ask the appointing authority whether it would consent to a suspension in lieu of the discharge, and then usually the question is how much of a suspension. If they will not agree to it, then we are limited to two alternatives, either we then sustain the discharge or we must take the extreme position of finding the party suitable for employment and reinstate in toto from the beginning. There is nothing in between unless the Department expresses its concerns to it. That is our Charter as it is written; so those are our limited alternatives." (Civil Service Commission Transcript February 6, 1976, hearing; found at page 483 Court record on appeal.)

. . . .

"President Hartsfield: . . . I have to say as I think I did last time we met, I really am beginning to resent the appearance being given that

> we are a reviewing authority, we are not. We do not have the authority and the options that a reviewing authority would have under the 'Charter of Limitations' and yet everyone is quick to blame us for unacceptable results that come about by the lack of understanding and between two individuals." (Civil Service Commission Transcript February 27, 1976, hearing; found at page 612 Court record on appeal.)

The above issues raised before the hearing officer were also raised before the Civil Service Commission. Additionally they were raised before the Superior Court (see Appendix F), before the Court of Appeal of the State of California (see Appendix G), and in a Petition for Hearing before the California Supreme Court (see Appendix H).

ARGUMENT IN FAVOR OF ISSUANCE OF WRIT

We shall discuss each of the issues in as brief a fashion as possible.

I

DOES GOVERNMENT HAVE THE ALTERNATIVE OF GRANTING A CONSTITUTIONAL MINIMUM PREDISCHARGE HEARING, OR IN THE ALTERNATIVE DENYING SUCH A HEARING, AND THEN TAKING ONE AND ONE-HALF YEARS TO COMPLETE A FORMAL HEARING AND REQUIRING THE EMPLOYEE TO GO TO COURT TO GET BACK PAY?

Some five months *prior* to Petitioner's discharge, this Court decided *Arnett v. Kennedy*, 416 U.S. 134, requiring at least a minimum predischarge hearing. Additionally, as we have seen, there was a written rule

in the City of Los Angeles *mandating* a pre-penalty or predischarge hearing of any kind, that rule having been in existence at the time Petitioner was hired and at the time she was discharged. Perhaps a lay person such as Dr. Reed would not be expected to know of *Arnett* or the aforementioned rule, but shouldn't the Los Angeles City Attorney's office know that under the decision and the rule, such a predischarge hearing would be required before there could be dismissal? And shouldn't city attorneys be required to call such decisions and rules to the attention of their clients—in this case both the persons doing the discharging and the Commission charged with hearing an appeal?

Arnett was followed by the California Supreme Court decision in *Skelly v. State Personnel Board*, 15 C.3d 194, this decision being issued shortly following Petitioner making her motion to the Civil Service Commission Hearing Officer asking that the entire hearing be stopped and Petitioner returned to her position until she had received her constitutional and contractual right to that predischarge hearing. When this motion was made, the hearing on the merits had not been completed.

Subsequent to *Skelly*, the California Supreme Court issued a decision dealing with the retroactive effect of *Skelly* and *Barber v. State Personnel Board*, 18 C.3d 395. In *Barber* the Court said:

> "Under these circumstances, the issue presented is the retroactive effect of our decision in *Skelly*.
>
> ". . .

"As a general rule a decision of a court overruling a prior decision or invalidating a statute will be given full retroactive effect.

". . .

"Two factors of primary importance in resolving the issue of retroactivity are the extent to which the change of the law was foreshadowed and foreseeable and the extent of the reliance placed upon the former rule of law.

". . .

"As evidenced by the above discussion in the decision in *Arnett*, the question whether a permanent Civil Service employee posssses a right to due process in disciplinary proceedings was far from settled prior to the *Arnett* ruling. Further, the nature and extent of the procedural high court's decision, the change in the law affected by this court's decision in *Skelly* was not realistically foreseeable. After the Supreme Court's *Arnett* ruling, however, the change was clearly foreseeable; in fact, the change was mandated by the high court's ruling.

". . .

"Our decision in Skelly is therefore applicable to all pending cases where the dismissals are not yet final." (Emphasis added.)

The dismissal was clearly *not* final as regards Petitioner when she made her motion, for the hearing on the merits itself was not even completed.

Respondents, and the Courts below, have relied on yet another California Supreme Court decision, *Keely v. State Personnel Board,* 53 C.A.3d 88, as meaning

that Government has two choices when discharging an individual, (1) to give the predischarge hearing called for in *Arnett* and *Skelly,* or, (2) in the alternative denying that constitutional right and requiring the employee to go through a formal hearing, then at the conclusion of the hearing giving back pay to the date of the final administrative decision if the discharge is upheld. We suggest this is an incorrect interpretation of *Keely,* for in that case the due process question had not been raised prior to the case having been completely tried and prior to this Court's decision in *Arnett.* The California Supreme Court said it would be a waste of time to go back and require a new predischarge hearing, to be followed by a formal hearing, when in fact the evidence was overwhelming at the completed hearing that the employee was properly discharged. This is entirely different than the case at hand where the hearing was not completed and the discharge not finalized.

To accept the decision as it stands in this case is to accept the theory that in discharging a tenured employee, Government need not grant the minimal predischarge hearing called for by this Court in *Arnett* and by the California Supreme Court in *Skelly.* To accept the interpretation placed on these two decisions in this case would be analogous to a rule in the criminal law field, saying that police officers can illegally break into and search a home, seize contraband, and then require the homeowner to go through the immense expense of a trial, following which a motion to suppress would be made and the

conviction overturned. Another analogy might be that we will deny a jury trial, convict, impose and carry out the death sentence, and thereafter determine that a constitutional right to a jury had been violated, requiring payment of money to the heirs. A constitutional right is either a right or it is not.

We believe the prayed for Writ should be granted to determine whether or not Government has an alternative to the granting of the minimal predischarge hearing.

II

IS A GOVERNMENT EMPLOYEE DENIED DUE PROCESS WHEN NOT PERMITTED TO COMPLETE THE PRESENTATION OF EVIDENCE TO REFUTE FALSE CHARGES, THE INABILITY TO PRESENT THE EVIDENCE EXISTING BECAUSE THE GOVERNMENT AGENCY CHARGED WITH THE RESPONSIBILITY OF HAVING THOSE WITNESSES PRESENT FAILED IN ITS RESPONSIBILITY, AND THE HEARING OFFICER REFUSED A CONTINUANCE? FURTHER, IS A GOVERNMENT EMPLOYEE DENIED DUE PROCESS WHEN A LAY ADMINISTRATIVE JUDICIAL BODY (CIVIL SERVICE COMMISSION) HAS AS ITS LEGAL ADVISER THE SAME ATTORNEY WHO IS PROSECUTING THE CASE AGAINST AN EMPLOYEE?

As we have seen, the Commission Hearing Officer ordered Petitioner to proceed with the hearing on the merits on January 19, 1976, even though her witnesses had not been ordered to return to that hearing by the Civil Service Commission in accordance with the hearing officer's prior order of August 25, 1975. The hearing officer denied a continuance to Petitioner. We deem it a denial of due process when

subpoenaed and present witnesses are excused by the judge on an order that they return when the judge advises them they must return, and then the judge fails to return those witnesses but orders the defendant to proceed with the hearing. Common sense tells us what a Catch 22 situation this creates. We think a correct rule is set forth in *Paskaly v. Seale*, 506 F.2d 1209 (9th Cir.) where the Court held the refusal in an administrative proceeding:

> ". . . to forbid a party to produce evidence or otherwise make an effective defense, may constitute a denial of due process if either liberty or property is at stake in the proceeding." (*Paskaly, supra.*)

The question of the City Attorney acting both as prosecutor against the Petitioner and as legal adviser to the Civil Service Commission, the body making the ultimate administrative decision on appeal, was not even discussed by the California Courts. An administrative body such as the Civil Service Commission is made up of lay people, and they must necessarily rely heavily on the advice of the attorney representing such a Commission. With these facts, we deem it a denial of due process for an individual to be prosecuted by the City Attorney while that City Attorney is also legal adviser to the lay administrative body hearing the appeal.

We respectfully suggest the Writ should issue to settle these important due process questions of law.

III

IS IT A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW TO DENY TO AN ADMINISTRATIVE JUDICIAL BODY THE RIGHT TO MAKE ITS OWN DECISION WITH REGARD TO PENALTIES TO BE IMPOSED? CONTRAWISE, IS THERE DUE PROCESS AND EQUAL PROTECTION AFFORDED A PENALIZED EMPLOYEE WHEN THE PERSON IN THE EXECUTIVE BRANCH OF GOVERNMENT WHO IMPOSED THE PENALTY, MAY PREVENT THE ADMINISTRATIVE JUDICIAL BODY FROM EXERCISING ITS OWN DISCRETION?

In our highly complex life today, we recognize the need for quasi-judicial bodies, and we can even understand the relaxation of technical rules of evidence before such bodies. On the other hand, we do not believe that any appellate body is constitutionally constructed if it does not have the power of independent action with regard to penalties imposed by the executive branch of government. We require employees to exhaust their administrative remedies, our goal being more rapid resolution of disputes, more informality, and the reduction of the already heavy burden faced by our judicial system. The decision in this case stands for the proposition that there is no constitutional problem presented by the Civil Service Commission of Los Angeles lacking the power to exercise its own discretion with regard to penalties after hearing an appeal by a penalized or discharged employee. We disagree.

As we have seen from the facts, the Civil Service Commission wanted to set aside the discharge, and after failing to get a second on a motion to suspend Petitioner for only 90 days, the Commission thereafter

unanimously adopted a 60-day suspension. But the appointing authority (executive branch) who had caused the discharge refused to agree, and on the advice of the City Attorney, the Commission then discharged Petitioner.

We believe a proper rule for the action of an administrative judicial hearing body is one such as is found in California Government Code Section 19582 which speaks of decisions by the State Personnel Board, saying:

> "(a) Hearings may be held by the Board or by any authorized representative, but the Board shall render the decision *which in its judgment is just and proper.*" (Emphasis added.)

By analogy, many decisions of our courts have uniformly struck down as violative of the constitutional doctrine of separation of powers, provisions and statutes which require consent of the prosecutor for a court to exercise judicial powers. (*People v. Tenorio,* 3 C.3d 89; *Esteybar v. Municipal Court,* 5 C.3d 119; *People v. Navarro,* 7 C.3d 248; *People v. Superior Court,* 11 C.3d 59.)

We respectfully suggest a Writ should issue to establish the authority of quasi-judicial bodies to act independently and make their own decisions.

IV

HAS PETITIONER BEEN DISCRIMINATED AGAINST BECAUSE OF HER SKIN COLOR AND HER SEX?

There are few among us who can admit our own racism or sexism, and yet we know these to be two major problems facing us every day. Here we find petitioner obtaining her professional status as a Doctor of Veterinary Medicine, licensed both in New York and California. She took a position which had been her life long dream, namely that of working at a zoo with exotic animals. There she did a highly commendable job, and additionally brought positive publicity to the Los Angeles Zoo by her appearance on television and in her writings for major magazines. Then this entire case lands on her shoulders, instituted by a man who greets her with, "Why are you so damn tall?" and then proceeds to discharge her while he himself is still a probationary employee, the discharge being based on alleged facts occurring prior to his own arrival.

We have also seen that the hearing officer for the Civil Service Commission shouted at Petitioner, denied her a continuance when she was without counsel, and forced her to proceed on the merits even though her previously subpoenaed witnesses had not been ordered to return in accordance with that hearing officer's own prior order.

We respectfully suggest that the racism-sexism issue is before this Court in as strong a case as can ever be made unless an individual will admit his or her own prejudice.

OPINIONS ON WHICH REVIEW IS SOUGHT

The opinions below for which review is sought are attached as Appendices A, B, C, D, and E.

CONCLUSION

We recognize the overwhelming burden on our courts today, especially our appellate courts, and most especially this Supreme Court. We know the chances of a writ being granted—at least if one considers simple percentages—but we *beg* this Court to grant the Writ, or in the alternative, follow a second suggestion which we believe could resolve the problem.

We suggest that this Court ask the California Supreme Court to grant a hearing in this case. We sincerely believe the issues are so dramatic, and that Petitioner has been so greatly wronged, that a request by this Court to the California Supreme Court would, hopefully, result in that Court hearing the case and dealing with these major constitutional issues.

We plead with this Court to take whatever action is necessary in order to return to Petitioner her dignity, her professional status, and her right to constitutional due process and equal protection of the law.

Dated this 15th day of May, 1978.

JOHN E. THORNE,
THORNE, CLOPTON, HERZ, STANEK,
MANCHESTER, EDDY, INC.,
Attorneys for Petitioner.

(Appendices Follow)

Appendices

Appendix A

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Feb. 22, 1977

I have this day filed Order

Hearing Denied

In re: 2 Civ. No. 50370

Reed

vs.

City of Los Angeles et al.

Respectfully,

G. E. Bishel
Clerk

Appendix B

Not for Publication

In the Court of Appeal of the State of California
Second Appellate District

Division Three

2d Civ. No. 50370
Super. Ct. No. C145080

Dr. Rosalie Reed,
Plaintiff and Appellant,
vs.
The City of Los Angeles, Recreation and Parks Department of said City, and the Civil Service Commission of the City of Los Angeles,
Defendants and Respondents.

[Filed Dec. 20, 1977]

APPEAL from judgment of the Superior Court of Los Angeles County. Harry L. Hupp, Judge. Affirmed.

John E. Thorne, Thorne, Clopton, Herz, Stanek, Manchester, Inc., for Appellant.

Burt Pines, City Attorney, John B. Rice, Senior Assistant City Attorney, Neil C. Baker, Deputy City Attorney, for Respondents.

On March 19, 1976, Rosalie Reed, a licensed veterinarian, filed a document entitled, inter alia, petition for writ of mandate seeking reinstatement to her tenured civil service position at the Los Angeles city zoo with back wages and other vested employment benefits. Following a court trial, limited to the first and fourth causes of action, judgment was rendered awarding her back wages and employment benefits for a limited period but denying any further relief. Petitioner appeals from the judgment insofar as it impliedly determines her discharge to be lawful by failing to order reinstatement to her former position with full pay and benefits.

Contentions

With a calculated risk of over simplification we perceive the primary issue on appeal to be that the admitted failure to afford petitioner the full administrative hearing mandated by the Supreme Court in *Skelly v. State Personnel Bd.*, 15 Cal.3d 194, prior to discharge deprived her of due process as guaranteed by the United States and California Constitutions.

Facts

No claim being made of insufficiency of the evidence, we deem the following trial court findings determinative of the factual basis for this appeal (*A. H. Robins Co. v. Department of Health*, 59 Cal.App.3d 903, 907):

"On September 6, 1974, the Petitioner was discharged by the Los Angeles Recreation and Parks

Department from her position as a veterinarian at the Los Angeles Zoo. There was no predischarge hearing of any kind. . . .

3. Following the Petitioner's filing of a timely appeal from her discharge, the Los Angeles Civil Service Commission appointed a hearing examiner to conduct an administrative hearing on the merits of the charges and thereafter to submit a written report containing a summary of the evidence and a statement of his findings and recommendations."

"19. The administrative hearing was completed on January 19, 1976. . . .

"Respondents proposed findings #21, 22 (as modified by the Court) 23, 24 (as modified) and 26 are incorporated herein by reference.

"21. After consideration of a substitution of a suspension in lieu of discharge, the Los Angeles Civil Service Commission took final action based on the hearing examiner's report on February 27, 1976. On that date the Civil Service Commission voted unanimously to sustain the discharge of the Petitioner. The Civil Service Commission made a factual determination that the Petitioner had not been afforded her procedural due process rights until the administrative hearings had been completed on January 19, 1976.

22. Based on the hearing officer's summary, the Court, in the exercise of its independent judgment, finds that the Respondents' findings are supported by the weight of the evidence and that the findings

support the Respondents' decision. No transcript was provided which would enable the Court to review the matter other that by review of the hearing officer's summary.

23. During the administrative hearings before the hearing examiner, a member of the Los Angeles City Attorney's Office represented the Department of Recreation and Parks. At those times when the Petitioner's appeal was considered by the Los Angeles Civil Service Commission, a different member of the Los Angeles City Attorney's Office acted as adviser to the Commission solely with respect to questions of law.

24. The Court, after reviewing the portions of the administrative transcript submitted and exercising its independent judgment, finds insofar as the matter can be reviewed on a partial administrative record that the Petitioner was afforded a fair trial in the administrative proceedings.

25. The Petitioner was not afforded her procedural due process rights prior to the discharge action by the Department of Recreation and Parks on September 6, 1974."

From these findings it was concluded, in the exercise of the trial court's independent judgment, that:

"2. The Petitioner was not afforded her procedural due process rights prior to her discharge by the Department of Recreation and Parks on September 6, 1974, and therefore, her discharge was not constitutionally valid as of that date.

3. The Court finds that the decision in *Keely v. State Personnel Board,* 53 C.A.3d 88 (1975) is controlling, and therefore Petitioner's discharge was constitutionally valid as of January 19, 1976.

4. Judgment should therefore be entered as follows:

(a) Granting, in part, the Petition for Writ of Mandate and ordering a Peremptory Writ of Mandate to issue from this Court, limited to commanding Respondents to pay to Petitioner her salary from the 6th day of September, 1974, to and including the 19th day of January, 1976, the salary to include any increases that would have automatically been granted to Petitioner by virtue of increases in the salary being paid for that position or that would have automatically occurred by virtue of the length of service during said time, and to include interest from the date any salary payment was due from and after the 6th day of September, 1974, until the same shall have been paid, including therein any other monies which would have been paid by Respondents for Petitioner's benefit during said period, this to include such items as any pension, disability, or other payments that would have been paid by the Respondents to or for the account of Petitioner during said period of time."

Judgment was entered accordingly.

Discussion

Fully aware of the Supreme Court decision in *Skelly v. State Personnel Bd., supra,* 15 Cal.3d 194,

215, mandating limited preremoval procedural safeguards, in the interest of constitutional due process, the trial court concluded that petitioner was afforded a constitutionally valid predischarge hearing as of January 19, 1976, and, under *Keely v. State Personnel Board,* 53 Cal.App.3d 88, 97-98, her termination from employment was valid as of that date.

Petitioner argues before this court that the awarding of back pay from the date of her unlawful discharge September 6, 1974, to January 19, 1976, was an inappropriate remedy and that her motion to dismiss the proceedings before the Civil Service Commission should have been granted with mandatory reinstatement to her position. We do not agree. While *Skelly* and *Keely* may have left some room for doubt in petitioner's mind as to the appropriate remedy for one discharged without the preremoval hearing mandated by *Skelly,* that doubt has been laid to rest contrary to the position taken by petitioner by our Supreme Court in the recent case of *Barber v. State Personnel Bd.,* 18 Cal.3d 395, 403, wherein it is said:

> "The constitutional infirmity of the disciplinary procedures used in the present case was the imposition of discipline prior to affording the employee notice of the reasons for the punitive action and an opportunity to respond. (*Skelly v. State Personnel Bd., supra,* 15 Cal.3d at 215.) This infirmity is not corrected until the employee has been given an opportunity to present his arguments to the authority *initially* imposing discipline. *(Id.)* Under the procedures applied to plaintiff, the constitutional vice existed until the

time the board rendered its decision. Prior to that time, the discipline imposed was invalid."

Petitioner's other due process arguments directed at proceedings before the administrative body are answered adversely to her by specific findings of the trial court and by its general finding that:

"The Petitioner was not afforded her procedural due process rights prior to the discharge action by the Department of Recreation and Parks on September 6, 1974."

Petitioner suggests that the penalty of discharge is too severe, requiring reversal. The question of severity of the penalty of discharge was also considered in *Barber, supra,* wherein it is said at page 404:

> "Plaintiff's argument the punishment imposed is so severe as to constitute an abuse of discretion is also without merit. The penalty imposed by an administrative body will not be disturbed in mandamus proceedings unless an abuse of discretion is demonstrated. (*Skelly v. State Personnel Bd., supra,* 15 Cal.3d at 217; *Magit v. Board of Medical Examiners* (1961) 57 Cal.2d 74, 87 [17 Cal.Rptr. 488, 366 P.2d 816].) Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed. (*Nightingale v. State Personnel Board* (1972) 7 Cal.3d. 507, 515 [102 Cal.Rptr. 758, 498 P.2d 1006].)"

In the instant case we cannot say as a matter of law that the punishment imposed (discharge) constitutes an abuse of discretion. (See also *Marino v. City of Los Angeles,* 34 Cal.App.3d 461, 464.)

We note that the trial court findings were based in large part upon an independent review of the hearing officer's summary and hampered by a partial administrative record. Such no doubt prompts in part the suggestion on appeal that the trial court should have ordered the preparation at court expense of a transcript of the proceedings at the administrative hearing. Bearing in mind that the burden is upon the party seeking review to produce a record which discloses the error relied upon *(People v. Wilkins,* 169 Cal.App.2d 27, 31) in order to overcome the presumption of validity of the judgment *(Weiss v. Brentwood Sav. & Loan Assn.,* 4 Cal.App.3d 738, 746-747), the suggestion is without merit. We do not deem the conditional motion for preparation of a transcript, if it can be so dignified, compelled that it be granted. The failure to do so was not an abuse of discretion. Furthermore there is no showing that the hearing officer's summary was not a fair and complete representation of what occurred at the administrative hearing. The record before us simply does not support a conclusion that the failure of the court to order a transcript deprived petitioner of due process at any stage of the proceedings.

Without citation of authority petitioner argues that section 112 of the Los Angeles City Charter is unconstitutional "for it requires one of the parties litigant to approve the judgment of that administrative hear-

ing body."[1] In the instant case Dr. Reed was discharged by the Los Angeles Department of Recreation and Parks and filed a timely appeal with the Los Angeles Board of Civil Service Commissioners. The argument is made that, even though the board might wish to substitute a suspension for a discharge, it may do so only if the department approves such alteration, thus depriving the board of its own autonomy. We need not belabor the point. The charter in section 112 gives the board complete authority to reverse an order of discharge without approval of the department. Section 112 authorizes the board to *also* alter the penalty with consent of the department. When the entire section is read together *(County of Placer v. Aetna Cas. etc Co.,* 50 Cal.2d 182, 188-189), we do not visualize the constitutional problem suggested by petitioner.

---

[1]This section provides in pertinent part:

"Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed, discharged or suspended to be reinstated or restored to duty. The board with the consent of the appointing authority may also order a reduction in the length of the suspension, or substitution of a suspension for a removal or discharge, if the board finds, in writing, that such action is warranted."

As a corollary of this argument petitioner suggests that the failure of the board to complete the investigation into the charges against her within the 15 days provided in section 112 deprived her of due process. The suggestion is meritless. Section 112 does not require that the investigation be completed in 15 days but rather that it be started within that time. In the instant case the record shows the notice of discharge was given on September 6, 1974, the appeal to the board was taken within 5 days and the board acted on September 20, 1974, within the 15 day period, to grant review by ordering a hearing on November 13, 1974.

While we recognize that this opinion is subject to the criticism that it fails to reveal a detailed analysis of the facts and complete review of the applicable law, its failing in these respects is brought on by the highly confused state of the limited record before us, augmented by the failure of counsel to clearly and adequately define the issues in the briefs. (See Cal. Rules of Court, rules 13 and 15(a); *Brown v. World Church,* 272 Cal.App.2d 684, 691; *Weiss v. Brentwood Sav. & Loan Assn., supra,* 4 Cal.App.3d 738, 746-747.) We are however, satisfied that petitioner has been afforded due process and that the "sense of outrage" and emotional appeal introduced into the case by her counsel is unwarranted by the record before us. We agree with counsel that perhaps he did misinterpret respondents' brief and that under the circumstances the apology tendered on page 1 of the closing brief is appropriate. We are satisfied that the trial court

acted properly in denying reinstatement under the facts and applicable law and must therefore affirm the judgment as rendered under the rules of appellate procedure governing this case.

The judgment is affirmed.

Not for publication.

Allport, J.

We concur:
Cobey, Acting P.J.
Potter, J.

Appendix C

[180] Superior Court of the State of California for the County of Los Angeles

No. C 145080

Dr. Rosalie Reed,
Petitioner,
vs.
The City of Los Angeles; the Parks and Recreation Department of the City of Los Angeles; the Civil Service Commission of the City of Los Angeles,
Respondents.

[Filed May 17, 1976]

JUDGMENT GRANTING PEREMPTORY WRIT OF MANDATE

This matter came regularly for trial before this Court on April 7, 1976 pursuant to Petitioner's Motion for a Peremptory Writ of Mandate. John E. Thorne appeared as attorney for Petitioner and Neil C. Baker appeared as attorney for Respondents.

The Respondents having filed an answer to the petition, both parties having submitted a memorandum of points and authorities, portions of the administrative transcript having been offered and received

in evidence and reviewed by the Court, additional exhibits having been received and examined by the Court, arguments having been presented, and the Court having made findings of fact and conclusions of law, which have been signed and filed,

It Is Ordered that:

1. A peremptory writ of mandate shall issue from this Court, limited to commanding **[181]** Respondents to pay to Petitioner her salary from the 6th day of September, 1974, to and including the 19th day of January, 1976, the salary to include any increases that would have automatically been granted to Petitioner by virtue of increases in the salary being paid for the position or that would have automatically occurred by virtue of the length of service during said time, and to include interest from the date any salary payment was due from and after the 6th day of September, 1974, until the same shall have been paid, including therein any other monies which would have been paid by Respondents for Petitioner's benefit during said period, this to include such items as any pension, disability, or other payments that would have been paid by the Respondents to or for the account of Petitioner during said period of time. There shall be deducted from said total sum any money Petitioner has earned during the period from September 6, 1974, to and including January 19, 1976, the Court reserving jurisdiction to

determine said items if the parties do not agree.

2. Petitioner is awarded her costs in this action in the sum of $————.

Dated: May 14, 1976.

/s/ Harry L. Hupp
Harry L. Hupp
Judge of the Superior Court

Appendix D

[427] February 6, 1976

Board of Civil Service Commissioners
City of Los Angeles

Excerpts from Minutes

A regular meeting of the Board of Civil Service Commissioners was held on the above date, convening at 2:30 p.m.. Present were:

President	Arnett L. Hartsfield, Jr.
Commissioner	Ruth A. Boak, M.D.
Commissioner	Dr. John C. Bollens
(Left during recess on Item 1.a., Page 2)	
Commissioner:	C. Thomas Fizzolio
General Manager	Mrs. Muriel M. Morse
Acting General Manager	Howard Zuck
Board's Legal Counselor	Bert Glennon

Proceedings in the matter of the Appeal under Charter Section 112(a)—Presented for Decision, of Rosalie A. REED, Veterinarian I, Department of Recreation and Parks. Discharge.
Commission File No. 33096

Appearances before the Board:
John Thorne, Attorney for Dr. Reed
Dr. Rosalie A. Reed, Appellant
Neil Baker, Deputy City Attorney

Commission Secretary: Sylvia Gonzales
Hearing Reporter: Helga H. Muder

[491] [64] Commissioner Fizzolio: Do you want to make the motion, or do we just rule on that ourselves?

Commissioner Boak: Why don't you rule on that yourselves.

Secretary: There is no second to the current motion.

President Hartsfield: If we don't have a second—

Commissioner Fizzolio: If we don't have a second, then let's make Dr. Boak's motion the new motion, and I will second that motion.

President Hartsfield: It's been moved and seconded that we request of the Recreation and Parks Department whether they would consider a suspension for sixty days in lieu of the discharge, and that we continue this matter for two weeks. All in favor of the motion indicate by saying aye.

Vote recorded: Ayes: (3) Unanimous
Noes: None

Appendix E

[601] February 27, 1976

Board of Civil Service Commissioners
City of Los Angeles

EXCERPT FROM MINUTES

A regular meeting of the Board of Civil Service Commissioners was held on the above date, convening at 1:55 p.m. Present were:

President	Arnett L. Hartsfield, Jr.
Vice President	Ms. Irene Tovar
Commissioner	Ruth A. Boak, M.D.
Commissioner	C. Thomas Fizzolio
General Manager	Mrs. Muriel M. Morse
Board's Legal Counselor	Bert Glennon

Proceedings in the matter of the Appeal from Discharge of Dr. Rosalie A. REED, Veterinarian I, Department of Recreation and Parks. Commission File No. 33096

Commissioner Tovar: I had to withdraw my original motion. I'm withdrawing my original motion which is for 180 days suspension to one of termination effective as of January 19, 1976.

Commissioner Fizzolio: All right, well then——

President Hartsfield: Is there a second?

Commissioner Boak: I second it.

President Hartsfield: All right, it's been properly moved and seconded that the recommendation of discharge be sustained, but that this Commission find

that the requirements of Skelly were not satisfied until January the 19th, 1976.

Commissioner Fizzolio: And that discharge be effective——

President Hartsfield: And that discharge be effective as of that date, January 19, 1976. All in favor indicate by saying aye.

[627] Vote recorded: Ayes: 1 (Unanimous)

Noes: None

President Hartsfield: All right.

(Whereupon discussion of this matter was concluded, and the Board proceeded to the next item on its agenda.)

Appendix F

[187] In the Superior Court of
the State of California in and for
the City and County of Los Angeles

No. C 145080

Dr. Rosalie Reed,
Petitioner/Plaintiff,
vs.
The City of Los Angeles; et al.,
Respondents/Defendants.

[Filed Jun. 3, 1976]

MEMORANDUM OF POINTS AND AUTHORITIES

I

It is a denial of one's constitutional right to due process under the U. S. Constitution Amendments Five and Fourteen and the State of California Constitution, to deny a tenured Civil Service employee a predischarge hearing prior to said discharge being effective.

The trial court in this case has, we respectfully suggest, misinterpreted the *Skelly* decision and the *Keely*

decision. In *both* of those cases tenured Civil Service employees had been discharged, they had had *completed* and rapid hearings on the charges long prior to the *Skelly* decision of the California Supreme Court. Additionally, the decisions in both *Skelly* and *Keely* failed to establish that either of the discharged employees in those cases had raised the due process question prior to the completion of said hearings on the merits of the charges brought against them.

We point to the instant case (forgetting for the moment **[188]** that the Parks and Recreation Department of the City of Los Angeles had a mandatory rule calling for a predischarge hearing) where it is clear that Petitioner made her motion for such predischarge hearing prior to the completion of the hearing on the merits, prior to *Skelly*, and prior to *Keely*. *Keely* clearly establishes that the hearing would have to be *completed* before the constitutional safeguards are fulfilled, the Court in that case saying:

> "It was not until a hearing was actually held *and completed*, on April 19, 1974, that the constitutional safeguards to which Appellant was entitled were fulfilled." (*Keely v. State Personnel Board*, 53 C.A.3d 88). (Emphasis added).

In the instant case the Court has the evidence before it that the hearing officer had ordered that he would make his recommendation on Appellant's motion to terminate the hearings before any further hearing on the merits, and the evidence that the witnesses Petitioner had subpoenaed for the August 25, 1975 hearing, were excused prior to testifying on order

that they return when notified. They were not notified by the Commission to return to the January 19, 1976 hearing, at which time the hearing officer forced a continuance of the hearing on the merits. The Petitioner said she would not proceed on the merits on January 19, 1976, until the motion of her due process rights was ruled upon in accordance with the hearing officer's prior order and until the witnesses she had the Commission subpoena previously, were present. Add to this the fact that Petitioner was unrepresented with regard to the merits of the charges when she appeared at the January 19, 1976 hearing, because her prior counsel who had attended the three prior hearings when evidence was taken on the merits had unilaterally withdrawn, and her present counsel who appeared with her on January 19, 1976, was appearing specially on the predischarge motion and not on the merits of the case. In view of these facts, to say that *Skelly* has been complied with, is, we respectfully suggest, a failure to do *any* **[189]** justice, let alone substantial justice, and most assuredly is a denial of Petitioner's constitutional rights to due process before this Court and before the administrative board itself.

Skelly v. State Personnel Board, 15 C.3d 194;
Keely v. State Personnel Board, 53 C.A.3d 88.

II

The failure of the Recreation and Parks Department to follow its own mandatory rule requiring a predischarge hearing is a violation of Petitioner's constitutional rights to due process under the Fifth and Fourteenth Amendments of the U. S. Constitution and under the State Constitution of the State of California, and is illegal and requires reversal of the discharge of Petitioner and reinstatement of Petitioner to her position.

Exhibit B attached to Petitioner's Petition for a Writ of Mandate in the instant case, speaks for itself. It mandatorily requires a predischarge hearing, and in effect established just what the *Skelly* decision has now said is a requirement to protect one's property right in a job prior to discharge even though there is no such rule as is evidenced by Exhibit B. Petitioner accepted her position with the City of Los Angeles when that procedural rule was in effect, and thus it becomes one of her rights attaching to the job itself. If this mandatory legal requirement of the Recreation and Parks Department can be ignored by the Respondents in the instant case, the rule of law becomes meaningless. Anytime "the system" doesn't have to follow its own mandatory rules, especially when dealing with the property right that an individual has in his or her occupation, we have anarchy. We suggest that the failure of the Court in the instant case to reinstate Petitioner because of the failure of Respondents to follow said mandatory rule (Exhibit B attached to Petition for Writ of Man-

date) is a denial of Petitioner's due process rights as required by the Constitution of **[190]** the United States and the Constitution of the State of California, and is a further denial of Petitioner's constitutional right to equal protection of the law as required by the U. S. and California Constitutions.

U. S. Constitution, Fifth and Fourteenth Amendments. California Constitution, Art. I, Sec. 13.

III

The Penalty of Dismissal in the Instant Case Is Excessive and Disproportionate to Any Alleged Wrong, Assuming Arguendo That the Hearing on the Merits Was Completed.

On this point we cite the Court to the facts as set forth by the California Supreme Court in *Skelly,* and to the decision thereon, a decision in which the Court held that the penalty of dismissal was excessive and disproportionate to the alleged wrong. We ask that that be compared to the facts in the instant case (and we wonder how the Court can determine what those facts are when it does not have the transcript before it), assuming that the charges as brought are all true (a fact which we most assuredly deny on Petitioner's behalf). We respectfully suggest that if the facts in the *Skelly* case were not supportive of a discharge, in the instant case the facts clearly do not support such discharge.

We further cite the Court to the record which establishes that the Civil Service Commission itself found that discharge was not the proper remedy, and

even found that a 90-day suspension was not proper, instead passing a motion for only a 60-day suspension of Petitioner. And that Commission had before it a more complete administrative record than does this Court. If the judgment of the members of the Commission (and it is not just one person making a decision) is that a 90-day suspension is too long, and that a 60-day suspension would be more proper, we respectfully suggest that this Court is exceeding its authority in upholding the discharge. We **[191]** recognize that the Court may say it is merely upholding what the Civil Service Commission did, but we must point to the fact that the Civil Service Commission did not have the power to enforce the 60-day suspension, the Commission being able to do that *only if* the appointing authority who had discharged Petitioner agreed to a substitution of the suspension in lieu of discharge. This Court is not so bound.

Skelly v. State Personnel Board, 15 C. 3d 194;

Charter of the City of Los Angeles, Sec. 112, which says in part: "The Board *with the consent of the appointing authority* may also order a reduction in the length of suspension, or substitution of a suspension for a removal or discharge, if the Board finds, in writing, that such action is warranted." (Emphasis added).

IV

The Failure of the Respondents to Follow the Charter of the City of Los Angeles with Regard to Investigations of Civil Service Employees Discharged Constitutes a Denial of Petitioner's Rights of Due Process and Equal Protection Under the U. S. and California Constitutions.

Section 112 of the Los Angeles City Charter in effect at all times relevant to the instant case provides in part and with regard to the action the Board must take when a discharged employee has made application for a hearing:

> "*Within 15 days* after such statement shall have been filed, the said Board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said Board within 5 days after service upon him of such statement, *shall proceed to investigate* the grounds for such removal, discharge or suspension." (Los Angeles Charter, Sec. 112) (Emphasis added).

This language in the Charter requires that the Board act within 15 days, and the evidence before this Court clearly establishes that Petitioner was discharged September 6, 1974, and the first **[192]** hearing date was not set until November 13, 1974. Thus, not only did the Commission fail to complete the investigation into the charges against Petitioner within 15 days, the Commission didn't even *start* said investigation within 15 days. As the Court knows, even under this Court's interpretation the hearing was not completed until January 19, 1976, almost a year and one-half from

the date of discharge. We respectfully suggest that this is a denial of equal protection and due process under the U. S. and California Constitutions, and once again is a failure on the part of Respondents to follow the law as it is written in the Charter that controls the action of Respondents.

U. S. Constitution, Fifth and Fourteenth Amendments; Charter of the City of Los Angeles, Sec. 112.

V

Under the Charter of the City of Los Angeles, the Civil Service Commission of Said City Is Powerless to Act Independently When a Tenured Civil Service Employee Has Appealed a Discharge or Disciplinary Action Taken Against Said Employee, Thus Denying Said Employee's Due Process Under the U. S. and California Constitutions.

As was pointed out above, the Civil Service Commission of the City of Los Angeles, under Los Angeles Charter Sec. 112, both as written and as interpreted by the Civil Service Commission, is powerless to amend an appointing authority's suspension or discharge without the concurrence of the appointing authority who leveled the suspension or discharge on the appealing employee. Thus, the Civil Service Commission is not an independent body which can make its own decision based upon the evidence as it finds it, and the employee is clearly denied due process if there is no independent administrative body that can make its own decision and render its own judgment

based on the facts as said Commission finds them to be. An analogous situation would be one in which a Court, after hearing **[193]** the evidence in a trial charging an individual with murder, would be limited to either acquittal or holding said person guilty of the murder charge, and would be powerless to hold said individual guilty of a lesser included offense. We suggest that in the instant case, there is no administrative appeal if the administrative body hearing the appeal has no power to act independently, and the failure to provide such power to the Civil Service Commission is a denial of due process and equal protection of the law as provided for in the U. S. and California Constitutions.

Thus we are suggesting that this Charter provision as written and as interpreted by the Civil Service Commission amounts to the lack of any effective administrative remedy for a wrongful discharge. The Court is here holding the Petitioner to the exhaustion of the administrative remedy by using the administrative record as a basis for its decision, and yet the California Supreme Court has clearly held that the requirement of exhaustion of administrative remedies is inapplicable where the remedy is ineffective. The Court, then, in upholding the decision of the administrative body in the instant case and refusing to accept evidence outside of the administrative record is, we suggest, again denying equal protection and due process as required by the Constitution of the United States and of the State of California. In addition, it is failing to provide what courts are designed to provide—justice. Clearly this Court has, under

C.C.P. 128(8) the power to amend its orders and see that justice is done.

U. S. Constitution, Fifth and Fourteenth Amendments;
C.C.P. 128(8);
Sunnyvale Public Safety Officers' Assn. v. City of Sunnyvale, 55 C.A. 3d 732;
Glendale City Employees' Assn. v. City of Glendale (1975) 15 C. 3d 328.

[194] VI

The Failure of the Civil Service Commission to Complete the Administrative Hearing Denied Petitioner Due Process of Law.

As previously stated a number of witnesses originally subpoenaed by Petitioner for the August 25, 1975 hearing before the hearing officer were released at that time by the hearing officer on the condition that they would return to the next hearing. All agreed to so do. However, the Commission failed to notify said witnesses of the January 19, 1976 hearing and, despite the fact that said witnesses were not then present, the hearing officer attempted to complete the proceedings. Petitioner thereafter refused to submit to further questioning on the merits pending a decision on her motion and the hearing was concluded in her absence. Respondents have admitted the above in the Answer to the Petition.

The failure of the Civil Service Commission to order back the witnesses for the January 19th hearing resulted in an incomplete hearing. Petitioner was denied the opportunity to present an *effective* defense

and thus any opportunity to be heard which may have been afforded her was rendered meaningless. Petitioner recognizes that an administrative hearing need not comply with all the procedural safeguards of a criminal proceeding. However, a certain minimum of constitutional due process is required in an administrative proceeding where, as in the instant case, it involves the right to pursue and maintain employment, a true property right protected under the due process clause of the Fifth Amendment. Our Courts have consistently applied this due process standard where property rights are involved. In *Paskaly v. Seale,* 506 F. 2d 1209 (1974), the Ninth Circuit held the refusal in an administrative proceeding "to permit a party to introduce evidence or otherwise make an effective defense may constitute a denial of due process if either liberty or property is at stake in a proceeding."

[195] The California Supreme Court, in *Walsh v. Kirby,* 118 C.R. 1 (1974), held when a government agency vested with fraud and administrative powers "acts in an arbitrary manner so as to affect capriciously the property or property rights of persons subjected to its administrative controls, it denies those persons due process of law." The hearing afforded Petitioner was clearly arbitrary and capricious in that it was "concluded" on the merits prior to a decision on Petitioner's motion and without the benefit of testimony from either the Petitioner or the witnesses she had previously subpoenaed. We respectfully suggest that this is a denial of due process under the U. S. and California Constitutions.

VII

The Court Abused Its Discretion in Refusing to Order the Preparation of the Administrative Transcript

Code of Civil Procedure Section 1094.5(a) states in part:

> ". . . All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the Petition, may be filed with Respondent's Points and Authorities or may be ordered to be filed by the Court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs."

Clearly the language authorizing the court to order the transcript was included for the purpose of enabling the court, in certain circumstances where the transcript is either not produced at all or only produced in part, to acquire the record needed in order to do substantial justice between the parties. However, the Court denied Petitioner's motion that the Court order further preparation of the record on the ground that Petitioner is indigent and cannot provide the funds for the presentation of that record. As a result, Petitioner was denied a full and fair judicial review solely on the basis of indigency. In the particular circumstances of this case **[196]** Petitioner was caught in a Catch 22 situation. As previously stated, the Commission delayed completing its hearing for almost a year and one-half from the date of discharge. During that long period of delay Petitioner did not

receive any salary, was unable to seek other employment, and was barely able to survive, let alone afford the tremendous expense of preparing the transcript. Despite these circumstances, the Court refused to order a transcript for Petitioner at State expense. Thus, the system protects itself by causing the Petitioner to go broke and then denying her financial aid to adequately bring her claim.

We respectfully suggest the denial of the Motion not only was an abuse of the Court's discretion under Section 1094.5(a) but constitutes a denial of equal protection and due process under the U.S. and California Constitutions.

Conclusion

Based on the foregoing we respectfully suggest that the Court should reverse its present decision which has denied Petitioner the right to return to her Civil Service position with respondent.

Respectfully submitted this 2nd day of June, 1976.

Thorne, Clopton, Herz,
Stanek, Manchester, Inc.
/s/ John E. Thorne
John E. Thorne
Attorneys for Petitioner

Appendix G

In the Court of Appeal of the State of California
Second Appellate District

No. 50370

Dr. Rosalie Reed,
Plaintiff & Appellant,
vs.
The City of Los Angeles, Recreation and Parks Department of said City, and the Civil Service Commission of the City of Los Angeles,
Defendants & Respondents.

APPELLANT'S OPENING BRIEF

Appeal from the Superior Court
Los Angeles County
Honorable Harry L. Hupp, Judge

John E. Thorne,
Thorne, Clopton, Herz,
Stanek, Manchester, Inc.,
510 North Third Street,
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(408) 286-1212
Attorneys for Appellant

ISSUES

1. Is a tenured government employee entitled to a predischarge hearing under the due process laws of the United States and State Constitutions, and if so, is that employee entitled to have a formal hearing terminated before it has been completed when the employee has been denied such a hearing and has been terminated as to pay?

2. In the special circumstances of this case, was Dr. Reed denied due process by the denial of a predischarge hearing and by the failure of the H.O. to follow his own order that he would rule on her request for reinstatement pending a predischarge hearing prior to completing the hearings on the merits, all of this so as to allow higher authorities to ultimately rule on the issue?

3. Was Dr. Reed denied due process by the failure of the Parks and Recreation Department to follow its own rule and regulation which was in effect at the time Dr. Reed was hired and at the time she was discharged, said rule mandating a predischarge hearing, it being Dr. Reed's position that this was part of her contract of employment?

4. Was error committed both by the H.O. and the Trial Court in failing to see that Dr. Reed had the opportunity to present the subpoenaed witnesses who had been excused by the H.O. on orders that they would be asked to return at a later date if needed, but in fact they were not ordered returned when the H.O. insisted upon proceeding on the merits?

5. Even assuming that the charges brought against Dr. Reed are correct and true, do they warrant the penalty of discharge in view of the C.S.C's own attempt to substitute a 60-day suspension, and in view of the decision of the California Supreme Court in *Skelly?*

6. Should the Trial Court have ordered the preparation of the transcripts requested by Dr. Reed, those transcripts being the only ones missing and the only ones which contained the evidence on the merits?

7. Was Dr. Reed denied due process by a denial of a right to a full and complete hearing, assuming arguendo that *Skelly* and *Keely* do not require a predischarge hearing?

8. Is the Charter of the City of Los Angeles unconstitutional to the extent that it denies due process in failing to give autonomy to the C.S.C., the appellate body, when a case is presented to them involving the suspension or discharge of an employee, i.e., under that Charter the Commission must go back to the person who suspended or discharged the employee and have their approval before the Commission can alter the imposed penalty?

9. Did the Respondent City fail to follow the mandated provision of the City Charter that on an appeal in a case such as the one at hand, the Commission must act within 15-days?

(We have not included the entire brief in this Appendix—only the "Issues" section.)

Appendix H

1 Civ. No. 50370

In the Supreme Court of the State of California

Dr. Rosalie Reed,
Petitioner & Appellant,
vs.
The City of Los Angeles, Recreation and Parks Department of said City, and the Civil Service Commission of the City of Los Angeles,
Defendants and Respondents.

PETITION FOR HEARING

John E. Thorne,
Thorne, Clopton, Herz,
Stanek, Manchester, Inc.,
510 North Third Street,
San Jose, California 95112
(408) 286-1212
Attorneys for Petitioner
and Appellant

REASONS FOR GRANTING PETITION

We believe the Petition should be granted so as to answer the following questions, and because we believe Dr. Reed's discharge is totally unjust:

1. The Trial Court, whose position was affirmed by the Court of Appeal, has interpreted this Court's decision in *Skelly* and a Court of Appeal decision in *Keely v. State Personnel Board,* 53 C.A.3d 88, as meaning that government has two choices when they discharge an individual: (1) to give that individual the predischarge hearing called for by *Skelly,* and thereafter proceed with the discharge and allow the employee to have a full hearing, *or* (2) the government may grant no predischarge hearing, requiring the employee to go through a full appeal hearing (taking in this case 1½ years) and thereafter pay back wages at the conclusion of the full hearing.

The question: Have the Trial Court and the Court of Appeal correctly interpreted *Skelly* and *Keely?*

2. Is Section 112 of the Los Angeles City Charter constitutional insofar as it requires approval of the person suspending or discharging an employee before the Civil Service Commission (the appellate body) may reduce the length of suspension or substitute a suspension for a removal or discharge?

3. Has Petitioner been denied due process in view of the following:

(a) The H.O., the C.S.C., and the Trial Court refused to reinstate Dr. Reed or order immediate back pay and continuation thereof, even though Dr. Reed made a motion for such action *prior* to completion of the hearing on the merits of the discharge.

(b) The H.O. ordered Dr. Reed to proceed with the hearing on the merits on January 19, 1976, in

violation of his prior order that no further merit hearing would occur until the constitutional issue was decided by himself, forwarded as a recommendation to the C.S.C., and higher authorities had finally determined that issue.

(c) The H.O. refused to continue the January 19, 1976, hearing even though Dr. Reed had no attorney who could proceed on the merits. Her prior counsel had unilaterally withdrawn and he was the only one who had attended the only three prior hearings on the merits which had occurred, her counsel at the January 19, 1976, hearing was appearing specially, and there was no transcript of the three prior hearings, nor could Dr. Reed afford to purchase such a transcript.

(d) The City Attorney acted as prosecutor of the case against Petitioner and likewise acted as legal adviser to the C.S.C., the judge making the ultimate decision.

(e) Even though it was the Commission's responsibility, and was the H.O.'s order, that Dr. Reed's previously subpoenaed witnesses were to return on call of the Commission, the Commission did not notify those witnesses to be present at the January 19, 1976, hearing.

(f) In spite of Dr. Reed's indigency, the Trial Court refused her motion that the court order preparation of the three merit hearing transcripts so as to test the sufficiency of the evidence to sustain the discharge.

4. Is Dr. Reed entitled to reinstatement with back pay because she had a contractual right to a predischarge hearing under the rule existing at the time of her discharge which requires such predischarge hearing?

5. Even assuming that all charges brought against Dr. Reed are true, is the penalty of discharge too harsh a penalty when we realize the C.S.C. wanted to impose a 60-day suspension in lieu of discharge?

6. Are the actions of the person who discharged Dr. Reed and the H.O. who heard the case for the C.S.C. sufficiently tainted with racism and sexism to require a reversal of her discharge?

(We have not included the entire Petition—only the "Issues" section.)

Supreme Court, U. S.
FILED
JUN 23 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-1636

ROSALIE REED,

Petitioner,

vs.

THE CITY OF LOS ANGELES, RECREATION AND PARKS DEPARTMENT OF SAID CITY, AND THE CIVIL SERVICE COMMISSION OF THE CITY OF LOS ANGELES,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-1636

ROSALIE REED, Petitioner, vs. THE CITY OF LOS ANGELES, RECREATION AND PARKS DEPARTMENT OF SAID CITY, AND THE CIVIL SERVICE COMMISSION OF THE CITY OF LOS ANGELES, Respondents.	)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-1636

ROSALIE REED,

Petitioner,

vs.

THE CITY OF LOS ANGELES, RECREATION AND PARKS DEPARTMENT OF SAID CITY, AND THE CIVIL SERVICE COMMISSION OF THE CITY OF LOS ANGELES,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA */

* This should properly read "On Petition for Writ of Certiorari to the Court of Appeal of the State of California Second Appellate District Division Three", inasmuch as the Supreme Court of the State of California merely denied hearing following issuance of the Court of Appeal decision.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATED JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondents, City of Los Angeles, et al., respectfully pray that the Petition for Writ of Certiorari to review the judgment of the Court of Appeal of the State of California, entered against Petitioner in the matter of Rosalie Reed v. City of Los Angeles, et al. (2d Civ. No. 50370) be denied.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, 2d Civ. No. 50370, filed December 20, 1977, is attached to the Petition as Appendix B.

The Findings of Fact and Conclusions of Law issued by the trial judge, sitting in the Superior Court of the State of California for the County of Los Angeles, Case No. 145080, are summarized in the Court of Appeal decision attached to the Petition as Appendix B. The Judgment Granting Peremptory Writ of Mandate is

attached to the Petition as Appendix C.

The decision of the Board of Civil Service Commissioners on February 27, 1976 sustaining the Hearing Examiner's recommendation of discharge is attached to the Petition as Appendix E.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Petitioner's first three (3) questions presented for review in this Petition when restated in view of the history of this litigation, are reduced to the following:

> Does the Due Process Clause of the United States Constitution require reinstatement of Petitioner, a tenured, city, civil service employee, where Respondents failed to provide adequate procedural due process protections prior to the initial discharge, even though Petitioner was afforded such protections through a post discharge hearing and was awarded back pay by the state courts for the period between the initial

discharge and completion of the post discharge hearing?

Petitioner's fourth question, concerning allegations of race and sex discrimination, is improperly presented through this Petition inasmuch as the issue was severed by the trial court and thus not tried, or reviewed by the state appellate courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petition excerpts (pp. 5 and 6) as pertinent, the Fifth and Fourteenth Amendments to the United States Constitution, and Section 13, Article I of the California Constitution.

The California Code of Civil Procedure, Section 1094.5, is set forth in Appendix A.

The Los Angeles City Charter, Article IX, Section 112(a), is set forth in Appendix B.

STATEMENT OF THE CASE

Petitioner was hired by the Los Angeles Recreation and Parks Department as a Veterinarian at the Los Angeles Zoo in 1972 and became a permanent civil service employee. Petitioner was discharged from that position on September 6, 1974 without a predischarge hearing of any kind and filed a timely appeal from the discharge with the Los Angeles Civil Service Commission (hereinafter "the Commission"), pursuant to Section 112 of the Los Angeles City Charter.

The Commission appointed an impartial hearing examiner who conducted an administrative hearing on the merits of the charges upon which the discharge was based. Three full days of hearings were held on May 28, 29 and July 1, 1975. During these hearings, 11 witnesses, including the Petitioner, gave testimony with respect to the charges. The Petitioner testified at length on July 1, 1975 with respect to most of the charges but did not complete her direct testimony.

On August 25, 1975, Petitioner moved to dismiss the charges on ground that Petitioner had not been afforded her predischarge procedural due process rights.

On December 5, 1975, Petitioner appeared before the full Civil Service Commission, where the motion for dismissal was repeated, citing Skelly v. State Personnel Board, 15 Cal.3d 194 (1975) and a Recreation and Parks Department rule requiring predischarge notice. The Commission returned the matter to the Hearing Examiner to complete the hearing.

Petitioner then sought an injunction in Los Angeles Superior Court barring discharge until predischarge procedural due process rights were observed; the injunction was denied.

Shortly before the hearing on Petitioner's request for an injunction, Petitioner had been notified in writing by the Commission that further hearings were to take place before the Hearing Examiner on January 19, 1976, and if necessary, on January 20, 1976.

On January 19, 1976, the administrative hearing reconvened. Petitioner objected to further hearings on the merits pending a final ruling on the due process motion and refused to proceed with the hearing. The Hearing Examiner announced that he would make his ruling based upon the evidence that was before him. Petitioner again requested that the due process motion be ruled upon. The Hearing Examiner refused, stating that he would make that ruling when he made his recommendation to the Civil Service Commission.

The Hearing Examiner thereafter submitted a 36-page written report to the Commission indicating that Petitioner should have been given notice of the discharge and an opportunity to respond but recommending that the discharge be sustained on the evidence before him. His findings were that Petitioner had misappropriated City property for private use, that Petitioner falsified time records, that Petitioner failed to perform administrative duties, and that Petitioner failed to respond adequately to injured and dying Zoo animals.

In reviewing the findings of the Hearing Examiner, the Commission first recommended to the Recreation and Parks Department that Petitioner's discharge be amended to be a 60-day suspension. The Department refused to accept the suspension recommendation of the Commission. On February 27, 1976, the Commission then voted unanimously to sustain the discharge and made a factual finding that Petitioner had not been afforded her procedural due process rights until the administrative hearings had been completed on January 19, 1976. (Under the terms of the Charter of the City of Los Angeles, Section 112(a), the Commission is empowered to sustain the discharge of an employee by a City department or order reinstatement, but it may not amend the disciplinary action without the approval of the department.)

Petitioner then petitioned the Los Angeles County Superior Court for issuance of a Peremptory Writ of Mandate (C 145080) ordering back pay and reinstatement.

Pursuant to California Code of Civil Procedure Section 1094.5, the Superior

Court conducted an independent review of the administrative proceedings conducted under the purview of the Civil Service Commission and issued "Findings of Fact and Conclusions of Law" and "Judgment Granting Peremptory Writ of Mandate" on May 17, 1976. The "Conclusions of Law" were that;

> "1. Based on the portions of the administrative record presented to the Court, the Court finds Respondents' decision discharging Petitioner should be upheld. Respondents proposed conclusions #3, 4, 7, 8, 9, 10, 11 & 12 are incorporated herein by reference.
>
> "3. In a writ of mandate proceeding, the burden of proof rests on the petitioner to make a sufficient showing to establish administrative error and the petitioner has the initial burden of producing evidence.
>
> "4. The Petitioner failed to meet her burden of proof in rebutting the presumption that the Respondents regularly performed their official duties.
>
> "7. If the hearing examiner's report, received as Respondents' Exhibit A, is considered to be the administrative

record, the Court, in the exercise of its independent judgment, finds that the weight of the evidence supports the Civil Service Commission's findings and that those findings support its decision.

"8. The Petitioner was given reasonable and adequate notice that the administrative hearing on the merits of the charges against her was to proceed on January 19, 1976.

"9. The completion of the administrative hearing on January 19, 1976 was not an abuse of discretion.

"10. In the administrative proceedings, Respondents

"a. Did not proceed without or in excess of their jurisdiction;

"b. Granted Petitioner a fair trial; and

"c. Proceeded in the manner required by law.

"11. The Los Angeles Civil Service Commission is a Commission of special and limited jurisdiction.

"12. The Los Angeles Civil Service Commission did not have jurisdiction to dismiss the charges against the Petitioner on the basis of the Department of Recreation and Parks' failure to follow a Departmental statement of procedure.

"2. The Petitioner was not afforded her procedural due process rights prior to her discharge by the Department of Recreation and Parks on September 6, 1974, and therefore, her discharge was not constitutionally valid as of that date.

"3. The Court finds that the decision in Keely v. State Personnel Board, 53 C.A. 3d 88 (1975) is controlling, and therefore Petitioner's discharge was constitutionally valid as of January 19, 1976."

The Judgment ordered back pay, complete with normal raise and interest, from September 6, 1974, the date of the discharge, to January 19, 1976, the date of the completion of the post-discharge hearing.

Petitioner appealed from the judgment of the Superior Court to the Second District Court of Appeal, Division Three (2d Civ. No. 50370), which affirmed the findings and judgment of the Court below on

December 20, 1977, stating:

> "We are . . . satisfied that petitioner has been afforded due process and that the 'sense of outrage' and emotional appeal introduced into the case by her counsel is unwarranted by the record before us."

Petitioner's Petition for Rehearing before the Court of Appeal was denied without comment on January 26, 1978.

Petitioner then petitioned the California Supreme Court for hearing, which Petition was denied without comment, as was a subsequent Petition for Rehearing and Reconsideration.

This Petition followed.

ARGUMENT

I.

THE ALLEGATION OF RACE AND SEX DISCRIMINATION WAS SEVERED INTO A SEPARATE ACTION BEFORE TRIAL AND MAY NOT PROPERLY BE REASSERTED NOW THROUGH THIS PETITION

Petitioner's "First Amended Complaint for Declaratory Relief, for Damages,

General, Special, and Punitive, and Petition for Writ of Mandate," No. 145080, filed March 16, 1976, before the Los Angeles County Superior Court, consisted of four causes of action. Only the third cause of action alleged race and sex discrimination and that cause of action, along with the second cause of action which is not in issue herein, were severed upon motion of Petitioner at the time of trial. The Court granted Petitioner's motion, ruling that:

> "The motion to sever is granted. The second and third counts are severed from the balance of the complaint and shall hereafter be treated as a separate action.
>
> "The matter to be heard then this morning is only the 1094.5 mandate action contained in the first and fourth counts. . . ." (Reporter's Transcript, p. 25: 10-15.)

Thus trial proceeded as to the first and fourth causes of action, pursuant to the administrative mandamus provisions of California Code of Civil Procedure Section 1094.5.

In Petitioner's appeal to the California Second District Court of Appeal (2d Civ. No. 50370), sex and race discrimination were not mentioned in any of the stated nine issues on appeal (although the issue was later reasserted in Petitioner's Petition for Rehearing and Reconsideration before that same court).

The issues of sex and race discrimination were again not mentioned in Petitioner's Petition for Hearing in the California Supreme Court.

Inasmuch as the allegation of race and sex discrimination was severed from the current matter before trial and the state appellate courts did not hear these issues upon appeal, it would be completely inappropriate for this Court to entertain the issue at this stage of the proceedings. See Eastlake v. Forest City Enterprises, 426 U.S. 668, 671, nn.2b and 3b (1976).

II.

DOES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION REQUIRE REINSTATEMENT OF PETITIONER, A TENURED, CITY, CIVIL SERVICE EMPLOYEE, WHERE RESPONDENTS FAILED TO PROVIDE ADEQUATE PROCEDURAL DUE PROCESS PROTECTIONS PRIOR TO THE INITIAL DISCHARGE, EVEN THOUGH PETITIONER WAS AFFORDED SUCH PROTECTIONS THROUGH A POST-DISCHARGE HEARING AND WAS AWARDED BACK PAY BY THE STATE COURTS FOR THE PERIOD BETWEEN THE INITIAL DISCHARGE AND COMPLETION OF THE POST-DISCHARGE HEARING?

Respondents have not and do not now dispute that, as found by the Hearing Examiner, the Commission, the Superior Court and the Court of Appeal, Petitioner was denied procedural due process rights in being initially discharged without first being advised of the underlying charges and afforded an opportunity to respond.

However, Petitioner was subsequently afforded more than the minimal procedural due process rights through the Civil Service Commission hearing process, which was completed before the discharge became effective. As a result, Petitioner received nearly $28,000.00 in back pay from

Respondents covering the time between the initial discharge and the actual effective date of discharge (which was the date of the completion of the civil service hearing).

This Petition demands, in addition, reinstatement as a remedy for the initial denial of procedural due process.

A. Reinstatement is Not Constitutionally Required Where an Employee was Discharged for Good Cause, but Minimal Due Process Rights Attendant to Discharge Were Not Afforded Until After the Initial Discharge.

The California Supreme Court held in Skelly v. State Personnel Board, 15 Cal. 3d 194 (1975), elaborating on Arnett v. Kennedy, 416 U.S. 134 (1974), that at minimum, pretermination procedures for permanent civil service employees must include: "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline."

Id. at 215.

Although Petitioner was initially discharged prior to Skelly, pursuant to Barber v. State Personnel Board, 18 Cal.3d 395 (1976), Skelly requirements were made applicable to all pending cases where dismissals were not yet final, including that of Petitioner.

However, as recently explained in Kirkpatrick v. Civil Service Commission, 77 Cal.App.3d 940, 945-946 (1978):

> ". . . The minimal due process rights required by Skelly prior to discharge are merely anticipatory of the full rights which are accorded to the employee after discharge. The employee can exercise those rights at the subsequent hearing, and if that hearing shows that there were good grounds for dismissal, the employee is not entitled to reinstatement; he is merely entitled to damages for the limited time period in which discipline was wrongfully imposed, i.e., the employee is entitled to back pay for the period from the time discipline was actually imposed to the date the commission filed its decision validating the dismissal. (Barber v. State Personnel Bd.,

supra, 18 Cal.3d at pp. 401-403; Skelly v. State Personnel Bd., supra, 15 Cal.3d at p. 220, fn. 34; Kristal v. State Personnel Bd., supra, 50 Cal.App.3d at p. 241; Keely v. State Personnel Bd., supra, 53 Cal.App.3d at p. 98.)" (Emphasis in original.)

Petitioner in this case was afforded full Skelly rights and more before the discharge became effective on January 19, 1976. She was advised of the charges against her, and testimony and documentation was received in the hearing conducted by the Hearing Examiner. She had the opportunity to respond, but after testifying on direct for nearly a full day, declined to be cross-examined or present additional evidence, and the Examiner properly declared the hearing concluded.

The discharge was plainly for good cause. The Hearing Examiner found good cause for discharge, which was sustained by the Commission, and the Superior Court trial judge who reviewed the administrative proceedings pursuant to statutory administrative mandamus provisions (CCP § 1094.5) likewise found good cause for the discharge, and was upheld in that

regard by the Court of Appeal.

Back pay was awarded and paid Petitioner for the time period before the Skelly hearing was completed. Further remedy such as reinstatement is not legally, much less constitutionally, required.

B. No Federal Question is Raised by the Demand for Reinstatement

The procedures here utilized do not appear to conflict with any procedures approved in federal cases. In Bishop v. Wood, 426 U.S. 341 (1976) for example, this Court rejected a claim by petitioner that his discharge was based on mistaken information and that the discharge therefore violated his constitutionally-protected property interest. The Court held, however, that a constitutional claim does not arise whenever an employee is improperly discharged, unless the employee has been denied a constitutionally protected right:

"The federal court is not the appropriate forum in which to review the multitude of personnel

> decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable . . . . The United States Constitution cannot feasibly be construed to require federal judicial review for every such error." Id. at 349-50.

Where, as here, Petitioner was discharged for failure to fulfill the duties of her position as Veterinarian of the Los Angeles Zoo, no invasion of a constitutional right was involved in her discharge, and no federal constitutional question can be raised by her demand for reinstatement once minimal due process rights attendant to discharge are observed.

Aside from considerations of race, religion or constitutionally protected conduct, none of which appear to be involved here, the underlying right of a public employee to job security is found in the civil service statute in question, not the constitution. See Norton v. Blaylock, 285 F.Supp. 659, affirmed 409 F.2d 772 (5th Cir. 1969).

As this Court in Bishop v. Wood observed:

> "The fact . . . is that the instances in which the federal judiciary has required a state agency to reinstate a discharged employee for failure to provide a pretermination hearing are extremely rare. The reason is clear. For unless we were to . . . develop a federal common law of property rights, or [the] equally far-reaching view that almost every discharge implicates a constitutionally protected liberty interest, the ultimate control of state personnel relationships is, and will remain, with the States; they may grant or withhold tenure at their unfettered discretion." Id. at 349, n.14.

Federal cases have also considered and rejected claims of denial of due process by employees where the appointing authority has disregarded the recommendation of an appeals board. In Norton v. Blaylock, 285 F.Supp. 659 (W.D. Ark. 1968), the court held that the decision of an administrative tribunal favorable to an employee discharged by the appointing authority does not raise a federal constitutional claim:

> ". . . As far as the federal requirements and the Constitution

are concerned, all that the plaintiff was entitled to was a hearing. As stated, she received a hearing before a tribunal which obviously was not unlawfully prejudiced against her and in the Court's estimation the ultimate action of defendants in refusing to reinstate her has inflicted no legal wrong upon her. In other words, under the Constitution and the federal statutory and regulatory requirements, as written, she has no cause of action." Id. at 664.

That decision was affirmed on appeal to the Fifth Circuit, which remarked that:

"We agree with Judge Henley's reasoning that whether as a matter of policy the head of an agency should be bound by a decision of the Council is a question which does not address itself to the courts. If the rules and regulations for operation of the merit system are inadequate to safeguard the rights of employees, relief should be sought from the executive or legislative branches of the federal and state governments." Norton v. Blaylock, 409 F.2d 772, 774, n.1 (5th Cir. 1969).

Petitioner's assertion that the fact that a Deputy City Attorney represented the Department of Recreation and Parks in the administrative proceeding and that an Assistant City Attorney advised the Board of Civil Service Commissioners on legal questions (only) constituted a denial of due process, and that mere performance of these separate functions by members of the same public law office is per se a constitutional violation is fallacious. It is established California law that in the absence of proof of improper influence or overreaching or some specific denial of a fair hearing as a result of the action of the representatives of the public law office, it cannot be said that the mere fact that one member of the office performs an advocate's role for a City department and another member performs an advisory function to the Civil Service Commission constitutes a denial of due process. Ford v. Civil Service Commission, 161 Cal.App.2d 692 at 697 (1958) (where one county counsel represented a county department and another county counsel advised the county civil service

commission on legal questions during administrative hearings). Greer v. Board of Education, 47 Cal.App.3d at 119-120 (1975); see also Midstate Theatres v. County of Stanislaus, 55 Cal.App.3d 864 (1976).

No evidence exists in the present record to support a claim that the dual functions of the City Attorney's Office operated to deny Petitioner a fair hearing, and thus no true question of denial of due process is actually raised.

CONCLUSION

The Petition presents no substantial federal questions for review. No conflict between state and/or federal court decisions appears. No federal constitutional right of Petitioner appears to have been violated; failure to afford pretermination advisement of the reasons for discharge and an opportunity for response is not irremediable and fatal to ultimate sustaining of the discharge.

The procedural due process violation was more than remedied by providing Petitioner the opportunity for a full hearing

on the merits of the discharge before an impartial hearing examiner, and by payment of back pay, including normal raises and interest, up to the date of completion of the Skelly hearing. That hearing concluded that discharge was appropriate based upon the sustained charges against Petitioner, that she had misappropriated Zoo funds and supplies, falsified time sheets, and failed to adequately attend injured and dying animals. Petitioner's complaint that she did not sufficiently respond to the charges during the hearing is completely misplaced, in that she refused on the fourth day of proceedings to further participate, despite the offer of the Hearing Examiner to re-subpoena any witnesses requested by Petitioner; she denied herself the opportunity to more completely respond to the charges.

No federal question is presented by the demand for reinstatement inasmuch as the minimal due process rights attendant to discharge have now been observed, and no issues of race or sex discrimination (having been severed before trial) or constitutionally protected conduct are here involved.

Neither does the City civil service system, enacted by voters as a part of the City Charter, raise a federal question by the provision that the Commission may not amend a disciplinary action except with the approval of the appropriate City department. Further, a federal question is not raised by the mere fact that one Deputy City Attorney represented the Department of Recreation and Parks while an Assistant City Attorney provided legal advice to the Commission.

As the state Court of Appeal concluded, Petitioner has been afforded due process, and no amount of outrage, emotionalism, or reference to matters outside the record can change that fact.

Respondents respectfully request that this Petition for Writ of Certiorari be denied.

DATED: June 21, 1978

Respectfully submitted,

BURT PINES, City Attorney
JOHN B. RICE, Senior Assistant City Attorney
NEIL C. BAKER, Deputy City Attorney
MARIE C. BLITS, Deputy City Attorney

By MARIE C. BLITS
Deputy City Attorney

Attorneys for Respondents

APPENDIX A

APPENDIX A

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 1094.5 [Inquiry into validity of administrative order or decision]

(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (e) of this section remanding

the case to be reconsidered in the light of such evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit such evidence at the hearing on the writ without remanding the case.

(e) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

(f) Except as provided in subdivision (g), the court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing such

notice whichever occurs first; provided that no such stay shall be imposed or continued if the court is satisfied that it is against the public interest; provided that the application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which such appeal is taken; provided that, in cases where a stay is in effect at the time of filing the notice of appeal, such stay shall be continued by operation of law for a period of twenty (20) days from the filing of such notice. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which such appeal is taken shall otherwise order. Where any final administrative order or

decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of such proceedings.

(g) The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision of any licensing board respecting any person licensed pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, except Chapter 11 (commencing with Section 4800) thereof, or licensed pursuant to the Osteopathic Initiative Act or the Chiropractice Initiative Act pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing such notice whichever occurs first; provided that such stay shall not be imposed or continued unless the court is satisfied that the public interest will

not suffer and the licensing board is unlikely to prevail ultimately on the merits; and provided further that the application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which such appeal is taken; provided that, in cases where a stay is in effect at the time of filing the notice of appeal, such stay shall be continued by operation of law for a period of twenty (20) days from the filing of such notice. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which such appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed

while the penalty imposed is in full force and effect the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of such proceedings.

APPENDIX B

CHARTER OF THE CITY OF LOS ANGELES

Sec. 112. (a) Any board or officer having the power of appointment of officers, members and employees in any department of the government of the city shall have the power to remove, discharge or suspend any officer, member or employee of such department; but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause, which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing such removal, discharge or suspension shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed, discharged or suspended to be reinstated or restored to duty. The board with the consent of the appointing authority may also order a reduction in the length of the suspension, or substitution of a suspension for a removal or discharge, if the board finds, in writing, that such action is warranted. The order of said board with respect to such removal, discharge or suspension shall be forthwith certified to the appointing board or officer, and shall be final and conclusive; provided, that the order of any appointing board or officer suspending any person because of lack of funds in such department shall be final, and shall not be subject to review by said

Board of Civil Service Commissioners. If the Board of Civil Service Commissioners shall order that any person removed, discharged or suspended under the provisions of this section be reinstated or restored as above provided, the person so removed, discharged or suspended shall be entitled to receive compensation from the city the same as if he had not been removed, discharged or suspended by the appointing board or officer. (Amended, 1957.)

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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1977

NO. 77-1636

ROSALIE REED,

Petitioner,

vs.

THE CITY OF LOS ANGELES, RECREATION AND PARKS DEPARTMENT OF SAID CITY, AND THE CIVIL SERVICE COMMISSION OF THE CITY OF LOS ANGELES,

Respondents.

Petition for Writ of Certiorari
To The Supreme Court Of The
State of California

PETITION FOR REHEARING

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Petition for Writ of Certiorari to the Supreme Court of the State of California

---

PETITION FOR REHEARING

Petitioner hereby requests a rehearing and reconsideration of the Petition for Writ of Certiorari

previously filed in this action. We fear the chance of this rehearing being granted is about as great as the coyote has in changing the direction of the moon by howling in the middle of the desert. Nevertheless, we suggest justice will not be done in this case unless a rehearing is granted.

The following questions are based on undisputed facts in the record, and we ask these questions in urging this reconsideration:

1. Where is there justice in a system in which the rule of law established by a decision of this Supreme Court is violated by local government, and this Court then takes no action to see that its previously announced decision is followed?

2. Where is there justice in a system which says a judicial body may

not exercise its own independent judgment, and instead must have approval of its action from the executive branch of government?

3. Where is there justice in a system which denies a penalized employee the right to present evidence in defense against false charges, a system in which the judicial body (Civil Service Commission) is represented and advised by the same attorney who prosecuted the case against the employee?

4. Where is there justice in a system in which government may discriminate against a tenured employee based on race and sex?

ARGUMENT

I

WHERE IS THERE JUSTICE IN A SYSTEM IN WHICH THE RULE OF LAW ESTABLISHED BY A DECISION OF THIS SUPREME COURT IS VIOLATED BY LOCAL GOVERNMENT, AND THIS COURT THEN TAKES NO ACTION TO SEE THAT ITS PREVIOUSLY ANNOUNCED DECISION IS FOLLOWED?

In Arnett v. Kennedy, 416 U.S. 134, decided April 16, 1974, this Court said a tenured civil service employee is entitled to at least a minimal predischarge hearing. The undisputed facts of this case, as shown by the Writ previously filed, establish that Petitioner was summarily discharged five months after Arnett on September 6, 1974, and had no such predischarge hearing. We suggest that the decisions of this Court are meaningless if they can be so quickly violated, and this Court will take no action when the facts are presented.

Further, the undisputed facts establish that the Respondent City of Los Angeles had a written rule (existing prior to Petitioners being hired and at

the time she was discharged) mandating such a predischarge hearing, even specifying the persons to be present and requiring a written report. This rule of law was not followed by Respondent.

II

WHERE IS THERE JUSTICE IN A SYSTEM WHICH SAYS A JUDICIAL BODY MAY NOT EXERCISE ITS OWN INDEPENDENT JUDGMENT, AND INSTEAD MUST HAVE APPROVAL OF ITS ACTION FROM THE EXECUTIVE BRANCH OF GOVERNMENT?

Under the Charter of the City of Los Angeles, the final and only administrative judicial body (Civil Service Commission) is charged with hearing appeals of employees who believe they have been wrongfully discharged or penalized. However, under that same Charter that judicial body may not alter the penalty unless the person from the executive

branch who originally imposed the penalty approves the alteration! Where is there a separation of powers under such a Charter provision?

Further, where is due process when that same Civil Service Commission, composed of lay individuals, has as its legal adviser the same attorney who acts as prosecutor against the penalized employee in hearings before the Civil Service Commission?

III

WHERE IS THERE JUSTICE IN A SYSTEM WHICH DENIES A PENALIZED EMPLOYEE THE RIGHT TO PRESENT EVIDENCE IN DEFENSE AGAINST FALSE CHARGES, A SYSTEM IN WHICH THE JUDICIAL BODY (CIVIL SERVICE COMMISSION) IS REPRESENTED AND ADVISED BY THE SAME ATTORNEY WHO PROSECUTED THE CASE AGAINST THE EMPLOYEE?

The City Attorney of Los Angeles filed a response to our original Petition for Writ of Certiorari, claiming that the issues of racism and sexism had not been raised in any of the courts below. Petitioner filed a Response, attaching portions of the Briefs from the courts below to establish that these issues had been raised, thus proving the allegations of the City Attorney to be false. The record bears out that racism and sexism dictated the decision in this case which caused Petitioner, a licensed, Black, female Doctor of Veterinarian Medicine to lose her tenured position. Further the record establishes without dispute that the person discharging Petitioner had been employed by the City for only four months, thus he was without tenure, and he fired her for acts allegedly occurring prior to his being hired! We suggest a denial of the Petition for

Certiorari in this case means that government may discriminate against an individual because of that individual's race and/or sex.

FACTS

Our Petition for Certiorari set forth the facts of this case. Briefly they establish that this young Black woman, Dr. Rosalie Reed, was a tenured Doctor of Veterinarian Medicine at the Los Angeles Zoo. She was advised in advance of the new Zoo Director's arrival that he was a racist, as he had systematically attempted to get rid of all Blacks at the Omaha Zoo where he had at one time been employed. His first words to Dr. Reed were "Why are you so damn tall", and within four months of his employment (without an examination) he fired Dr. Reed for acts allegedly occurring prior to his arrival. She was given no predischarge hearing of

any kind, even though this Court had issued its decision in Arnett prior to that discharge, and further in direct violation of a rule of the department in which she worked which mandated a predischarge hearing before designated individuals, and which further required the issuance of a report before the discharge could be effective.

The lawyer she retained didn't even discover the decision of this Court in Arnett, nor the existence of the rule in the department in which she worked, thus never raising the issue, instead starting Petitioner out in a hearing, and then unilaterally withdrawing as her attorney before the hearing was completed! The Commission hearing officer failed to recall witnesses previously subpoenaed by Petitioner, although he had agreed to do so when he continued the case, and at the next hearing he scheduled he

refused a continuance even though those witnesses were not present, and Petitioner was unrepresented by counsel.

The hearing officer, who evidenced his racism and sexism by shouting at Petitioner, and by refusing to continue her case so that her witnesses could be present filed a recommendation with the Civil Service Commission recommending discharge.

Thereafter, the Civil Service Commission unanimously adopted a motion calling for only a 60-day suspension, but under the Charter of the City of Los Angeles that judicial body had to have approval of its action by the very man who fired Dr. Reed initially! Of course he would not approve the Commission decision.

CONCLUSION

We suggest that justice must mean that this Court's decisions will be

followed, and if not this Court will take action. We further suggest that due process should at least allow a penalized employee the opportunity of presenting his or her case, and not have a hearing officer prevent that presentation by failing to return witnesses after the hearing officer stated he would have them returned. We further suggest that a judicial body of law individuals being advised by the same attorney who prosecutes the case against the charged employee, is no judicial body at all--but is only the servant of the executive branch. And finally we suggest there is no justice if racism and sexism can be the basis for discharging a tenured civil service employee.

We find it difficult to believe that the nine (9) Justices of this Supreme Court looked at our Petition for Writ of Certiorari and then voted to deny the

same. We of course do not know the inner workings of the Court, but we hope and pray this Court will rehear our Petition for Certiorari and will grant the same. It is not only the mental and economic well-being of Petitioner which is at stake, but also it is the question of finding a system that will see justice done.

CERTIFICATE

The undersigned certifies that this Petition for Rehearing is presented in good faith, not for delay, and it is believed restricted to the grounds specified in Rule 58(2).

Respectfully and hopefully submitted this 13th day of October, 1978.

THORNE, CLOPTON & HERZ

By _____
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